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April 16, 1999

Magalie R. Salas, Secretary
Federal Communications Commission
The Portals Building
445 12th Street, SW
TW-A325
Washington, D.C. 20554

Re: Lockheed Martin Request
CC Docket No. 92-237 and NSD File No. 98-151

Dear Ms. Salas:

Please include the comments and reply comments accompanying this letter in the record for the above-referenced proceeding. These pleadings originally were prepared by PanAmSat Corporation ("PanAmSat") in response to Lockheed Martin's proposed acquisition of Comsat Corporation ("Comsat"). As a result, they address issues relating to the Lockheed Martin's participation in the telecommunications services market, including conflicts that will arise if Lockheed Martin is permitted to serve as, or have a cognizable interest in, the North American Numbering Plan Administrator ("NANPA").

As set forth more fully in the accompanying pleadings, the Communications Act and the Commission's rules require the NANPA to be "impartial and not aligned with any particular telecommunications industry segment." 47 C.F.R. § 52.12(a). Specifically, the NANPA may not be an affiliate of (*i.e.*, be controlled by, control, or be under common control with) any telecommunications service provider, and neither the NANPA nor any of its affiliates may "derive a majority of its revenues from[] any telecommunications service provider." 47 C.F.R. § 52.12(a)(1). Further, no entity that is "subject to undue influence by parties with a vested interest in the outcome of the numbering administration and activities" may serve as the NANPA. Id.

One year ago, the Commission approved the selection of Lockheed Martin as the NANPA. Although the Commission found Lockheed Martin to be in technical violation of the "neutrality principle" due to its affiliation with Loral SKYNET, the violation was deemed *de minimis* because the "customers of these SKYNET services constitute a discrete, specific group of former AT&T customers [who generally] do not use North American Numbering Plan resources." In the Matter of Administration of the North American Numbering Plan, 12 FCC Rcd 23040, 23080 (1997).

Lockheed Martin's purported neutrality as the NANPA now must be reevaluated in light of its proposed affiliation with Comsat. Comsat, an FCC common carrier, provides a variety of satellite-delivered telecommunications services that are interconnected with the PSTN. Comsat derives a large portion (if not a majority) of its revenues from telecommunications services, and its customers use numbering resources on more than an incidental basis. Lockheed Martin should not be permitted to be, through its investment in Comsat, a market participant whose fortunes turn on the use of numbering resources and an independent numbering administrator at the same time.

The proposed transfer of the Lockheed Martin Communications Industry Services (CIS) unit to Warburg, Pincus & Co. does not resolve this conflict. Lockheed Martin proposes to retain a five percent interest in the CIS unit and "the restructured CIS will deliver the same services using the same systems, processes and staff" as the current Lockheed Martin-controlled CIS. It appears, therefore, that Lockheed Martin will remain closely affiliated with the NANPA. Such an affiliation — if its acquisition of Comsat were to proceed — would violate the spirit, if not the letter, of the Commission's NANPA "neutrality principle."

Sincerely,

/s/ W. Kenneth Ferree
W. Kenneth Ferree
Attorney for PanAmSat Corporation

Attachments

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	
	)	
LOCKHEED MARTIN CORPORATION / REGULUS, LLC	)	File No. SAT-ISP-19981016-00072
	)	
For Authority to Acquire Up To 49 Percent of the Stock of Comsat as an Authorized Carrier Under the Communications Satellite Act of 1962	)	
	)	
COMSAT GOVERNMENT SERVICES, INC.	)	File Nos. SES-T/C-19981016-01388(2)
	)	
For Authority to Transfer Control of Comsat Government Services, Inc. to Regulus LLC, a Wholly-Owned Subsidiary of Lockheed Martin Corporation	)	ITC-T/C-19981016-00715

PETITION TO DENY OF PANAMSAT CORPORATION

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November 23, 1998

EXECUTIVE SUMMARY

A. Authorized Carrier Designation Is A Sham.

Lockheed Martin's effort to have itself classified as an "authorized carrier" in order to acquire 49 percent of Comsat is a sham intended to circumvent the statutory limitation on Comsat ownership by a single dominant owner. The 10 percent statutory ownership cap on non-carrier ownership was intended to prevent any single interest or group of interests from dominating the activities of the corporation. This concern applies as much to the carrier category of ownership as it does to the general ownership category.

That Congressional purpose for creating a special class of carrier ownership was to "co-opt" carrier opposition to the creation of Comsat and to give the fledgling company the benefit of the carriers' experience in international communications. The purpose was accomplished by the mid-1970s, when carrier ownership of Comsat was ended by the FCC. For the past 25 years, the authorized carrier ownership provision of the Satellite Act has been a statutory relic. Now Lockheed Martin seeks to resurrect this relic and use it to circumvent the still-valid statutory purpose of assuring the widest possible diversity of ownership of Comsat. The Commission should not permit this subversion of the Satellite Act.

Lockheed Martin not only is not an international common carrier, it has had to acquire one of Comsat's carrier subsidiaries even to approach the FCC and present itself for designation as an "authorized carrier." There can be no more telling demonstration that the proposed transaction stands on its head the Congressional purpose for creating a special class of ownership in Comsat.

Moreover, the Congress never intended that one carrier would occupy the entirety of this special ownership class. Even with respect to the carrier-owners, the Congress sought diversity of ownership. It would reverse the policy reflected in the Satellite Act and underlying Commission action during the past 36 years to allow Lockheed Martin not only to resurrect the class of authorized carrier ownership but to secure within that class a larger ownership block than ever permitted any single authorized carrier.

PanAmSat does not object to Lockheed Martin's purchase of Comsat, as long as a "normalized" Comsat is what is being purchased and not the unique entity that was

created by the Congress for another time and place. Only the Congress can overhaul the Satellite Act and create the conditions that would make the Lockheed Martin acquisition of Comsat appropriate and in the public interest. The FCC should defer to the Congress and await legislation that will create a new ownership paradigm for Comsat.

B. The Acquisition Would Be An Unauthorized Transfer Of Control.

The proposed acquisition violates the Communications Act in that a 49 percent ownership interest would give Lockheed Martin control of Comsat prior to Congressional review of the statutory and public policy implications of the acquisition. Professor John C. Coffee, Jr., a recognized expert in corporate governance, has reviewed the parties' agreements — material that the parties did not submit to the FCC — and states that he finds "implausible on almost any imaginable set of facts" the characterization of Lockheed Martin's 49 percent as a non-controlling interest. Professor Coffee based his conclusion on the following facts:

— the substantial "control premium" paid for Comsat shares;

— the preclusive effect of having a 49 percent block of voting stock when the remainder of the shares are broadly dispersed, as is required by law;

— the control and influence Lockheed Martin will have on the Comsat Board of Directors, far in excess of the three directors to which its "authorized carrier" status would entitle it;

— the effective veto power Lockheed Martin will have over all Comsat shareholder and management decisions; and

— the "golden handcuffs" Lockheed Martin will place on top Comsat management.

In the face of these facts not revealed to the FCC, Lockheed Martin's and Comsat's pledge to the FCC that Lockheed Martin will not exercise "control" until the Congress lifts the 10 percent ownership cap is meaningless.

C. The Application Raises The Issues Of Direct Access And Immunities.

Comsat should not be permitted to sell its exclusive access to the Intelsat system and its privileges and immunities as the U.S. Signatory to Intelsat and Inmarsat. Comsat was given a monopoly in providing Intelsat and Inmarsat services to U.S. customers based upon the now outmoded belief that the monopoly would best serve the public interest. As the FCC has concluded, the monopoly does not serve the public interest today. Comsat should not now be allowed to sell this monopoly. The Commission should consider Lockheed Martin's application, if at all, only after the Congress or the Commission has authorized direct access and taken the corollary step of ensuring that neither Intelsat nor Comsat can claim immunity from suit and legal process.

D. The Acquisition Could Substantially Lessen Competition In Key Satellite Markets.

The FCC has found that Comsat exerts dominance over switched voice/private line services, occasional-use video services, or both, in some 148 countries having a total population of 2.8 billion persons. That is nearly half the world's population. Comsat's dominance extends to over 2.6 billion persons and 26 million square miles of territory in the case of occasional-use video services, and nearly 600 million persons and over 11 million square miles of territory in the case of switched voice and private line services. Comsat is a dominant player in many sectors and a combination between Comsat and company the size of Lockheed Martin must be scrutinized for its competitive impact.

Economic analysis, prepared by Economists Incorporated, demonstrates that consummation of Lockheed Martin's tender offer would give "Comsat, Intelsat, Lockheed Martin and Intersputnik...an economic community of interest" that would "raise[] serious antitrust issues." To put these concerns in context, the Department of Justice and Federal Trade Commission's 1992 Horizontal Merger Guidelines presume that if a post-merger Herfindahl-Hirschman Index ("HHI") is above 1800, a merger that increases the HHI by more than 100 points is "likely to create or enhance market power or facilitate its exercise." In the Euro-Asian market, Economists Incorporated has found, consummation of the proposed tender offer would increase the HHI by more than 1,000 points, from 2,110 to 3,140 and maybe up to 3,410.

E. Carriers May Already Own More Than One Percent Of Comsat Stock.

Authorized carriers, as a group, may not hold more than 50 percent of Comsat's stock. The proposed acquisition of 49 percent of Comsat's stock by Lockheed Martin necessarily raises issues regarding the ownership of the remaining 51 percent of Comsat's stock. There is no indication in the application that these issues have been addressed in any meaningful way.

If other authorized carriers were to hold even 1.1 percent of Comsat's stock, the proposed transaction would result in a violation of the Satellite Act. Comsat, however, has made no attempt to ascertain whether, and to what extent, any of the beneficial owners of its stock are communications common carriers that should have applied to the Commission to become "authorized carriers."

F. Lockheed Martin's Ownership Would Conflict With Comsat's Signatory Duties.

The agreements between Comsat and Lockheed Martin would turn upside down the relative priorities that the Satellite Act and the Commission's decisions envision, making Comsat's private interests preeminent and the public's interest subordinate. The Comsat/Lockheed Martin merger agreement prohibits Comsat from taking certain actions with respect to Intelsat, Inmarsat, and New Skies, even if the U.S. Government instructs it otherwise. Lockheed Martin brings a greater number and more antagonistic commercial goals to Comsat and elevates those goals above the interests of the United States.

G. Lockheed Martin's Independence Would Be Compromised.

Ownership of Comsat also will conflict with Lockheed Martin's own responsibilities as administrator of the North American telephone numbering and local number portability plans, as well as with its multi-billion dollar contract to manage NASA's communications system.

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FEDERAL COMMUNICATIONS COMMISSION
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In re Applications of	)	
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PETITION TO DENY OF PANAMSAT CORPORATION

PanAmSat Corporation ("PanAmSat"), by its attorneys, hereby petitions to deny the above-captioned applications (the "Application").

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Communications Satellite Act of 1962[1] ("Satellite Act") represented a new departure for the United States in the field of international communications. The Satellite Act also was a radical innovation in creating a U.S. commercial communications service provider that had attributes of both a governmental entity and a private company. Thirty-six years later that entity, Comsat, is still unique. The Congress and the Kennedy Administration were well aware that they were doing something unprecedented and, as a result, they proceeded very deliberately. After extensive study and debate, they created a careful statutory construct for this unique entity, for its functions, and for its oversight.

Given the uniqueness of the entity, the overriding consideration with respect to Comsat's ownership was that it should be as widely dispersed and as diverse as

[1] 47 U.S.C. §§ 701 et seq.

possible. The Congress was adamant that no single interest or group of interests would be able to dominate Comsat's activities. However, bowing to the realities of injecting a new technology and a new player into the existing international communications "cartel," the Congress created a special class of ownership, up to 50 percent, for the group of U.S. international common carriers who, but for their ownership interest, could be expected to obstruct use of satellite facilities.

The balance of Comsat's ownership was to be dispersed widely among the general public, with no interest group or entity having more than 10 percent of the ownership. Years later, when Comsat management was fighting off a proxy fight for control, Comsat took the position that any group of shareholders who voted 10 percent or more of their shares together violated this statutory limitation.

Consistent with an ownership structure that included a set-aside for carriers, Comsat was enjoined to be a "carriers' carrier" and not to compete with its carrier-owners. As a carriers' carrier, Comsat was given a monopoly on access to intergovernmental satellite systems in the U.S.. As a quasi-governmental entity, Comsat was charged with accomplishing a number of public purposes, including being the U.S. representative to the soon-to-be-created intergovernmental satellite organizations. Because of the statutorily-conferred monopoly and the inherent conflict between its public purposes and its commercial instincts, Comsat was subjected to a high degree of governmental oversight, in addition to regulation by the FCC as a communications common carrier.

If the telecommunications world had remained static after 1962, the Satellite Act's detailed plan for an international telecommunications satellite structure would still be usable, but, of course, time did not stand still. Over the past 36 years, in the absence of a comprehensive overhaul of the Satellite Act, the FCC has struggled to adapt an increasingly outmoded statutory construct to a changing technological and competitive environment: by ending carrier ownership and permitting end user "direct access" to Comsat and by lessening regulatory oversight of Comsat as the competitive marketplace developed. The FCC, however, had gone about as far as it could go without requiring the Congress to up-date the Satellite Act. The proposed Lockheed Martin acquisition of Comsat has pushed this process over the brink.

Now, Lockheed Martin has appeared and presented the Commission with an incomplete application and a deeply flawed plan to step into Comsat's shoes and continue on, as if nothing had changed. The plan will not work.

• Where the Congress grudgingly conceded a special portion of Comsat ownership for common carriers and turned aside aerospace companies, Lockheed Martin seeks to mask its aerospace character by buying a Comsat common carrier subsidiary and bootstrapping itself into an ownership category that disappeared as a practical matter in the mid-1970s.

• Where the Satellite Act seeks to assure that no single interest or group of interests dominates Comsat's activities, Lockheed Martin wants 49 percent and, at least, *de facto* control of Comsat, as evidenced by:

— the control premium paid for Comsat shares;

— the preclusive effect of having a 49 percent block of voting stock when the remainder of the shares are broadly dispersed, as is required by statute;

— the control and influence it will have on the Comsat Board of Directors, far in excess of the three directors to which its "authorized carrier" status would entitle it;

— the effective veto power it will have over all Comsat shareholder and management decisions; and

— the "golden handcuffs" it will place on top Comsat management.

• Where the Congress and the FCC struggled to contain the inherent conflict between Comsat's public responsibilities and its commercial instincts, Lockheed Martin brings a greater number and more antagonistic commercial goals to Comsat and elevates those goals above the interests of the United States, as expressed in the Comsat instructional process. Ownership of Comsat also will conflict with Lockheed Martin's own responsibilities as administrator of the North American telephone numbering and local number portability plans, as

well as with its multi-billion dollar contract to manage NASA's communications system.

• While Congress and the FCC attempt to end Comsat's monopoly on access to the intergovernmental satellite systems and Comsat's privileges and immunities, Lockheed Martin seeks to milk them for all they are worth.

• And where candor is required to permit the FCC to determine whether the proposed transaction would serve the public interest, Lockheed Martin dissembles and hides behind an FCC application that does not begin to present the requisite elements of the transaction for FCC review, including:

— no request for transfer of control, a transfer apparent on the face of materials submitted to the Securities and Exchange Commission (attached hereto as Appendix 1) but not to the FCC;

— no showing as to the competitive impact of the transaction, particularly when the acquisition could substantially lessen competition in key satellite service markets; and

— no showing to permit the FCC to make an informed judgment as to whether common carriers already own more than one percent of Comsat stock.

PanAmSat does not object to Lockheed Martin's purchase of Comsat, as long as a "normalized" Comsat is what is being purchased and not the unique entity that was created by the Congress for another time and place. Only the Congress can overhaul the Satellite Act and create the conditions that would make the Lockheed Martin acquisition of Comsat appropriate and in the public interest. As the Commission is well aware, the Congress is moving expeditiously to do so. The FCC should defer to the Congress and await legislation that will create a new ownership paradigm for Comsat.

II. LOCKHEED MARTIN'S EFFORT TO HAVE ITSELF CLASSIFIED AS AN "AUTHORIZED CARRIER" IS A SHAM INTENDED TO CIRCUMVENT THE

STATUTORY LIMITATION ON COMSAT OWNERSHIP BY A SINGLE DOMINANT OWNER.

A. OVERVIEW

Section 304(b)(3) of the Communications Satellite Act provides that at no time may a stockholder who is not an "authorized carrier" hold more than a ten percent interest in Comsat's voting stock.[2] The only exception to this restriction is for "authorized carriers" who collectively may, with the Commission's consent, hold up to 50 percent of Comsat's voting stock.[3] An "authorized carrier" is defined for this purpose as "a communications common carrier which is specifically authorized…by the Commission to own shares of stock in [Comsat] upon a finding that such ownership will be consistent with the public interest and necessity."[4]

Behind this somewhat tautological definition of "authorized carrier" lies a very clear legislative purpose that underlies the bifurcated ownership structure that Congress created for Comsat, which consists of up to 50 percent common carrier ownership and the balance as widely dispersed public ownership. The ten percent ownership cap on non-carrier ownership was intended "[t]o prevent any single interest or group of interests from dominating the activities of the corporation… "[5] As shown below, this concern applies as much to the carrier category of ownership as it does to the general ownership category.

That Congressional purpose for creating a special class of carrier ownership was, essentially, to "co-opt" carrier opposition to the creation of Comsat and the use of satellite technology for international communications. Having invited the carriers into the tent, the Congress sought to give Comsat the benefit of the carriers' expertise in conducting its operations. The FCC then gave further effect to the legislative intent by making Comsat a "carriers' carrier," forbidding Comsat to serve end users and confining its customer base to international common carriers. There was, therefore, no conflict of interest between Comsat and its carrier-owners.

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[2] 47 U.S.C. § 734(b)(3).
[3] 47 U.S.C. § 734(b)(2).
[4] 47 U.S.C § 734(b).
[5] Senate Report No. 1584, 87th Cong., 2nd Sess. reprinted in 1962 U.S.C.C.A.N. 2269, 2272 ("Senate Report").

The purpose intended to be served by carrier ownership was accomplished, and the industry structure that followed from it was dismantled, by the mid-1970s, when carrier ownership of Comsat was ended by the FCC and Comsat was permitted to serve end users. For the past 25 years, the authorized carrier ownership provision of the Satellite Act has been a statutory relic that the Congress never got around to sweeping away. Now Lockheed Martin seeks to resurrect this relic and use it to circumvent the still-valid statutory purpose of assuring the widest possible diversity of ownership of Comsat. The Commission should not permit the subversion of the Satellite Act.

B. LOCKHEED MARTIN'S DESIGNATION AS AN "AUTHORIZED CARRIER" WOULD UNDERMINE THE OWNERSHIP PROVISIONS OF THE SATELLITE ACT.

The relationship between international communications carriers and Comsat contemplated by the Satellite Act was succinctly explained by Senator Pastore, the floor manager of the Senate bill:

> No one…has proposed that the satellite entity should go into competition with the existing carriers in serving the general public directly. To the contrary—the satellite corporation…will serve mainly the carriers. …Let me repeat these simple but important facts. The market to be served by the corporation consists of the carriers who will use its facilities. The market to be served by the carriers will be the senders and recipients of communications time. The corporation will depend upon the carriers for its revenues; the carriers will depend upon the corporation for facilities. …[T]he interest of the carriers will lie in promoting the success of the corporation, thereby promoting their own success, with resulting benefits to the public.[6]

In furtherance of this non-competitive vision, the carriers were permitted a special class of ownership of Comsat. The Commission stated in 1964, quoting Senator Pastore:

> The ownership structure of the Corporation was designed to reflect a dichotomy between the carriers, on the one hand, who have extensive experience in communications

[6] 108 Cong. Rec. 16920 (1962).

> operations to contribute to the Corporation and who will be the principal customers of the Corporation; and, on the other hand, the general public….[7]

The leading advocate of giving special stock ownership to international common carriers was, in fact, the Commission itself. In its "First Report" on the subject, the FCC expounded its view of the satellite system to be created as necessarily a creation of the U.S. international carriers and their counterpart foreign PTTs:

> [T]he international carriers themselves are logically the ones best qualified to determine the nature and extent of the [satellite] facilities best suited to their needs and those of their foreign correspondents, with whom they have long standing and effective commercial relationships and who necessarily will have a substantial interest in the operations of any satellite system.[8]

Lockheed Martin does not, and could not, suggest that it offers to Comsat the benefit of Lockheed Martin's experience as an international common carrier, that it is or will be a major user of Comsat's satellite services, that it has extensive experience in negotiating carrier arrangements with foreign PTT's or that it has any of the other attributes that international common carriers were thought to contribute to Comsat in 1962, which justified their preferential ownership status.

Lockheed Martin not only is not an international common carrier, it has had to acquire one of Comsat's carrier subsidiaries even to approach the FCC and present itself for designation as an "authorized carrier." There can be no more telling demonstration that the proposed transaction stands on its head the Congressional purpose for creating a special class of Comsat ownership. Moreover, the Congress never intended that one carrier would occupy the entirety of this special ownership class. As shown below, even with respect to the carrier-owners, the Congress sought

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[7] Amendment of Subpart H of Part 25 (Satellite Communications) of the Commission's Rules and Regulations with Respect to the Necessity of Approval of the Commission for Transfer of Stock by Authorized Carriers Prior to June 1, 1995, and Related Matters, 2 R.R.2d 1718, 1720 (quoting Senator Pastore, 107 Cong. Rec. 15821 (1964)) ("Transfer of Stock in Comsat").

[8] "In the Matter of an Inquiry into the Administrative and Regulatory Problems Relating to the Authorization of Commercially Operable Space Communications Systems," Docket No. 14024 (May 24, 1961) (the "First Report"), reprinted in Communications Satellites: Hearings Before the House of Representatives, Committee on Science and Astronautics, 87th Cong., 1st Sess. 540 (July 13, 1961).

diversity of ownership of Comsat, with AT&T's block of ownership being the "evil" necessary for a successful launch of the new enterprise.

C. EVEN WITHIN THE "AUTHORIZED CARRIER" OWNERSHIP CATEGORY, THE CONGRESS SOUGHT THE WIDEST FEASIBLE DIVERSITY OF OWNERSHIP.

At the time the Satellite Act was signed, the group of then-authorized carriers was a known and limited universe of less than a dozen entities,[9] the largest being AT&T.[10] Having decided to create a special class of ownership for the carriers, the Congress was concerned that the largest carrier, AT&T, would dominate Comsat but realized that, for the proposed communications satellite system to be implemented, AT&T would have to be given a greater than ten percent stake.

The argument made to the Congress was, "unless we let the carriers have a large interest in the system it will not effectively operate."[11] The dilemma that faced the Administration and the Congress is reflected in the following colloquy between Senator Symington and Assistant Attorney General Katzenbach:

> Senator Symington. Would you be willing, if the carriers refused to participate, to start a company that would not have anything to do with the present carriers, A.T. & T., RCA, I.T. & T., Western Union, etc.; the Government to back a new company where you would go out on the market and sell stock, build new ground stations, lay new lines, make new plans for reception, and create distribution facilities at the other end—all this independent of the present carriers?
>
> Mr. Katzenbach. No, sir…. [12]

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[9] Communications Satellites Part 1: Hearings before the House Committee on Interstate and Foreign Commerce, 87th Cong., 1st Sess. 74 (1961) (testimony of FCC Chairman Newton N. Minow).

[10] See, e.g., Antitrust Problems of the Space Satellite Communications System, 87th Cong. 2nd Sess., Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary ("Senate Antitrust Hearings") at 65-66 (Mar. 29, 1962) (Testimony of Nicholas deB. Katzenbach, Assistant Attorney General, Office of Legal Counsel, Dept. of Justice).

[11] 108 Cong. Rec. 7133 (1962) (Rep. Rosenthal).

[12] Communications Satellite Legislation Hearings before the Senate Committee on Aeronautical and Space Sciences, 87th Cong., 2nd Sess., on S.2650 and S.2814 (Mar. 7, 1962) at 387.

Senators debating the Communications Satellite Act were sometimes even more blunt, stating that the exception for "authorized carriers" to hold more than ten percent of Comsat in practical reality was an exception for AT&T, who, it was feared, might acquire up to 40 percent of Comsat's stock.[13] Even supporters of the bill conceded that the ownership provisions of the bill were necessary essentially to placate AT&T.[14]

At the same time that Congress faced up to the necessity of permitting AT&T a large block of authorized carrier stock, steps were taken to try to limit, at least over time, AT&T's anticipated influence over Comsat. The Congress tried to assure diversity of carrier ownership, as well as other checks and balances upon AT&T. Senator Pastore, for example, expressed the sentiment that other carriers could be counted on to check the influence of AT&T, so as to avoid a situation wherein any one carrier will own an unduly larger proportion of Comsat's stock.[15] Senator Pastore also emphasized that because the U.S. government controlled launch facilities, this would act as a further check on AT&T's influences over Comsat.[16]

Moreover, the diversity purpose was reflected, in part, in provisions that allow the FCC to require the sale of shares among any authorized carriers so as, "to promote the widest possible distribution of stock among the authorized carriers."[17] This

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[13] See, e.g., 108 Cong. Rec. 15180 (1962) (Sen. Long).

[14] 108 Cong. Rec. 10242-43 (1962).

[15] 108 Cong. Rec. 15821 (1962). As discussed in Section III of this Petition, infra, the statutory restrictions on ownership in Comsat's stock, coupled with the added restrictions imposed by Comsat that prevent a non-authorized carrier shareholder from exercising more than a five percent voting interest, see Comsat's Proxy Statement (Mar. 31, 1998), attached to Comsat's SEC Schedule 14D-9 at 227, "Solicitation/Recommendation Statement Pursuant to Section 14(D)(4) of the Securities Exchange Act of 1934" (Sept. 25, 1998) ("SEC Disclosure") at 228, and Comsat's averred position that any joint voting effort of shareholders who together hold more than ten percent of Comsat's stock is prohibited by statute, see Comsat's "Appendix to Memorandum of Law in Support of Shareholder Defendant's Motion to Dismiss the First Amended Complaint" (submitted in Comsat Corporation v. Crockett, Civil Docket No. 97-607-A (E.D.Va (1997)) at 14 , attached hereto as Appendix 2, all would serve to prevent any other shareholder or group of shareholders from forming any countervailing force to Lockheed Martin.

Comsat's SEC Disclosure is attached to this Petition as Appendix 1. All page references in this Petition to Comsat's SEC Disclosure in this Petition are to the "Disclosure Page" number.

[16] 108 Cong. Rec. 10242 (1962).

[17] 47 U.S.C. § 734(f).

purpose also underlies the provision in Comsat's current Articles of Incorporation, which prevents common carrier owners from selling more than two percent of the authorized carrier category of shares a year. Ironically, this "transfer restriction" is the only provision of the Articles of Incorporation that Lockheed Martin is requiring Comsat to amend.[18]

All of this goes to demonstrate that, while the statute might allow the FCC to permit a single authorized carrier to hold more than the 10 percent voting stock maximum permitted for non-authorized carriers, this was done out of what was perceived at the time to be necessity, nothing more. As conditions changed in the international satellite marketplace, the FCC fostered a change in the ownership make-up of Comsat. In 1972, in its domestic satellite proceeding, the Commission required AT&T to relinquish its 29 percent interest in Comsat, as a condition to AT&T's entry into the domestic satellite communications business.[19]

The Commission explained that, "[w]hile the participation of experienced carriers had a useful function when Comsat was newly organized and gaining communications experience, this relationship warrants reassessment in light of current conditions."[20] On reconsideration of its decision imposing conditions on AT&T's entry into domestic satellite communications, the Commission reiterated its assessment and stated that carrier ownership was no longer necessary to further the policies of the Satellite Act, since:

> Comsat has developed its own expertise and is a viable entity in its own right, thus obviating the need for the internal guidance and assistance of AT&T and other carriers.[21]

In this context, the Commission also pointed out that Congress in 1969, in amending the Satellite Act to adjust the voting rights of authorized carriers (reduced as the stock

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[18] See Shareholders Agreement between Comsat and Lockheed Martin, Art. II, § 2.4 (Sept. 18, 1998) (the "Shareholders Agreement"), attached to SEC Disclosure at 96.

[19] See Establishment of Domestic Communications-Satellite Facilities by Non-Governmental Entities, 35 F.C.C. 2d 844, 847-54 (1972) ("Second Report and Order on Domestic Satellites"), Memorandum Opinion and Order (reconsideration), 38 F.C.C. 2d 665, 679-80 (1972) ("MO&O on Domestic Satellites"); accord, Implementation of Section 505 of the International Maritime Satellite Telecommunications Act, 74 F.C.C. 2d 59, 67 n.6 (1979).

[20] Second Report and Order on Domestic Satellites, supra, at 849.

[21] 38 FCC Rcd at 680.

in Comsat held by these carriers was also diminished),[22] recognized that authorized carriers should play a diminished role in Comsat.[23]

AT&T subsequently relinquished its 29 percent interest in Comsat. From that time forward, the role of "authorized carriers" in Comsat has essentially become non-existent. Comsat currently reports that less than one percent of its stock is held by authorized carriers.[24] It would reverse the policy reflected in the Satellite Act and underlying Commission action during the past 36 years to allow Lockheed Martin to resurrect the special class of "authorized carrier" ownership and to secure within that class a larger ownership block than ever permitted any single authorized carrier even at the height of AT&T's prominence in the international telecommunications marketplace.

D. IN THE CONTEXT OF THE SATELLITE ACT, THE CONGRESS FOUND NO PUBLIC BENEFIT IN HAVING AEROSPACE COMPANIES OWN COMSAT.

Instead of international common carrier expertise, Lockheed Martin points to its experience as a manufacturer of space equipment.[25] Similarly, Comsat's Board of Directors, in listing the reasons supporting the Board's recommendation to accept the Lockheed Martin proposal, the Board pointed to:

> the financial resources and expertise of …[Lockheed Martin] in the research, manufacture and integration of advanced-technology satellite systems and products…[26]

Ironically, in what was probably the single most controversial part of the Satellite Act, other than carrier ownership, manufacturers, particularly Lockheed Aircraft Corp. and General Electric ("GE"), were denied the special ownership status granted to international common carriers. Prior to adoption of the Satellite Act, the FCC formed an *ad hoc* committee of international carriers to develop the framework of what would become Comsat. The Commission, however, refused to allow GE and Lockheed Aircraft to participate in this committee, stating:

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[22] 47 U.S.C. § 733(a).
[23] MO&O on Domestic Satellites, supra at 680.
[24] See Proxy Statement, SEC Disclosure at 228.
[25] Application at 25-26.
[26] SEC Disclosure, supra, at 26.

> We fail to see why ownership participation by the aerospace and communications equipment industries will be beneficial or necessary to the establishment of a satellite communications system to be used by the common carrier industry. On the other hand, such participation may well result in encumbering the system with complicated and costly corporate relationships, disrupting operational patterns that have been established in the international common carrier industry…[27]

After an extensive debate over the proposed absolute restriction of ownership in Comsat to international common carriers,[28] a compromise bill was introduced and eventually enacted, in which only international common carriers were given special ownership rights.[29] It was clearly understood by the Administration and the Congress that any ownership of Comsat by aerospace manufacturers, such as GE and Lockheed, would be limited to the purchase, not to exceed ten percent, of the publicly available portion of Comsat's stock.[30] Indeed, to address concerns of potential domination by individual entities, the proposal to limit individual entity's ownership in Comsat to ten percent came from GE. [31]

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[27] First Report, supra. See Communications Satellites, Hearings before the House Committee on Interstate and Foreign Commerce, 87th Cong., 1st Session. 74 (July 25, 1961) (Testimony of FCC Chairman Minow). The FCC maintained its view of the role of established international common carriers as owners of the satellite corporation throughout the long legislative process that led up to the final bill. See Communications Satellite Act of 1962, 87th Cong. 2nd Sess. Hearings Before the Senate Committee on Foreign Relations 79-81 (Aug. 3, 1962) ("Memorandum of the Federal Communications Commission Setting Forth Its Reasons for Preferring Common Carrier Ownership of Proposed Corporation") (1962); accord Letter from Robert E. Lee, Acting FCC Chairman to Phillip S. Hughes, Assistant Director for Legislative Reference, Bureau of the Budget, Executive Office of the President, Ref. No. 3200 (Aug. 28, 1962).

[28] See Staff Report prepared for the use of the Senate Committee on Aeronautical and Space Science, "Communications Satellites: Technical, Economic, and International Developments," 87th Cong. 2d Sess. 41 (Comm. Print 1962).

[29] Communications Satellite Act of 1962, 87th Cong. 2d Sess, Hearings Before the Senate Committee on Foreign Relations on HR 11040 (Aug. 3, 1962) at 23-24, 36 (Testimony of Attorney General Kennedy); Senate Report, supra, 1962 U.S.C.C.A.N. at 2272-73.

[30] Senate Antitrust Subcommittee, supra at 67 (Katzenbach); 108 Cong. Rec. 10353 (1962) (colloquy between Senators Kefauver and Yarborough).

[31] Commercial Applications of Space Communications Systems, Report of the House Committee on Science and Astronautics, Report No. 1279, 87th Con., 1st Sess. (1961) at 23.

III. THE PROPOSED TRANSACTION WOULD RESULT IN AN UNAUTHORIZED TRANSFER OF CONTROL OF COMSAT AND ITS FCC LICENSES.

A. OVERVIEW

Section 310(d) of the Communications Act, 47 U.S.C. § 310(d), prohibits the holders of Title III licenses from transferring control of their licenses without prior Commission approval.[32] Similarly, the Commission's rules, in implementing Section 214 of the Communications Act, 47 U.S.C. § 214, require common carriers to seek Commission approval prior to transferring control of their international Section 214 common carrier authorizations.[33] Comsat and its affiliates hold numerous Title III licenses and international Section 214 authorizations.[34]

The proposed transaction runs afoul of these requirements. Lockheed Martin's proposed acquisition of 49 percent of the stock of Comsat, along with the associated rights that it would acquire, would give Lockheed Martin *de facto* control of Comsat and its FCC licenses and authorizations. With the exception of the portion of their filing proposing a transfer of control of the handful of authorizations held by Comsat Government Systems, Inc. ("CGSI"), however, Comsat and Lockheed Martin have not filed a transfer of control application or made the showings that are required in connection with such an application.[35] Permitting their transaction to proceed in the

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[32] Section 310(d) provides, in pertinent part:

> No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

[33] See 47 C.F.R. § 63.18(e)(5) (setting forth the requirements for applications to assign, or transfer control of, international Section 214 authorizations).

[34] In addition to the Title III earth station licenses that it holds, Comsat also applies for and receives authorizations in connection with Intelsat and Inmarsat space stations. See, e.g., Comsat Corporation, DA 98-985 (May 22, 1998) ¶ 19 (authorizing Comsat, pursuant to the Satellite Act and Titles II and III of the Communications Act, to provide service via the Intelsat 805 satellite).

[35] The showing that the parties have made in the context of the application to transfer control of CGSI also is inadequate. CGSI holds a Section 214 authorization as a successor-in-interest to Comsat RSI, Inc. Paragraph h of the application to transfer control of this Section 214 authorization to Regulus states that "Regulus has no affiliation with any U.S. carriers whose

absence of a transfer of control application would result in an unauthorized transfer of control and violate Section 310(d) and Section 214.

B. SECTION 310(d) APPLIES TO *DE FACTO* AS WELL AS *DE JURE* TRANSFERS OF CONTROL.

The Commission has determined the elements constituting "control" principally in the context of cases involving control of Title III licenses for purposes of Section 310(d). It applies a substantially similar analysis, however, in cases arising under Section 214.[36]

The Commission recognizes three types of control that a party may have of a license or licensee: *De jure* control (*i.e.*, ownership of over 50 percent of the voting interests of the licensee); negative control (*i.e.*, ownership of 50 percent of the voting interests of the licensee); and *de facto* control (*i.e.*, when the holder of a minority interest is in actual control of the licensee).[37] A change in any one of these three types of control requires prior FCC approval.[38]

A party may have *de facto* control of a license or licensee regardless of the amount of equity held.[39] For example, in 1984 the FCC determined that John Kluge's 26

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facilities-based Section 214 international services Regulus proposes to resell." In fact, however, Regulus would be reselling the services of Comsat, a dominant carrier along some of the routes to be served by Regulus, and would be affiliated with Comsat by virtue of the fact that Regulus' parent company would own 49 percent of Comsat. See Comsat RSI, Inc., 10 FCC Rcd 13712 (Int'l Bur. 1995)(granting Section 214 application of Comsat RSI, Inc. for authority to resell Comsat's services).

[36] See, e.g., Regulation of International Common Carrier Services, 7 FCC Rcd 7331, 7333 & n.26 (1992).

[37] See In re Applications of Metromedia, Inc., 98 F.C.C.2d 300, 305-306 (1984).

[38] Id. at 305-307. The Commission applies a different set of criteria in cases in which the issue is not who has *de facto* or *de jure* control of the licensee, but rather is whether someone other than the licensee has *de facto* control over the operation of FCC-licensed facilities. See Volunteers in Technical Assistance, 12 FCC Rcd 13995 (1997); Intermountain Microwave, 24 R.R. 983 (1963).

[39] See In re Applications of BBC License Subsidiary L.P., 10 FCC Rcd 7926, 7931 (1995) ("Evaluating whether a party is in *de facto*, or actual control, of an applicant is not formulaic, but is fact-intensive."); In re Applications of Univision Holdings, Inc., 7 FCC Rcd 6672, 6675 (1992) ("The determination as to whether a party is in de facto control of an applicant or licensee transcends formulas, for it involves an issue of fact which must be resolved by the special circumstances presented.") (internal quotation omitted); In re Application of Raveesh K. Kumra, 6 FCC Rcd 3352, 3356 (1991) ("[I]ssues of control where there is not a dispositive

percent interest in Metromedia gave him *de facto* control of that company.[40] The ultimate test is whether the party in question, even if holding only a minority of the licensee's equity, has the "power to dominate the management of [the licensee's] affairs."[41] In order to make that determination, the Commission looks to a variety of factors, including: (1) the percentage of equity held by the party in question; (2) the ability to influence or elect members of the board of directors; (3) the ability to control the licensee's finances; (4) the ability to control the licensee's personnel decisions; (5) the ability to determine the manner or means of operating the licensee; and (6) the ability to determine the policy that the licensee will pursue.[42]

C. LOCKHEED MARTIN WILL HAVE *DE FACTO* CONTROL OF COMSAT.

Comsat and Lockheed Martin represented in the application that they filed with the FCC that Lockheed Martin would not control Comsat if it were to complete its tender offer for Comsat's shares.[43] They did not, however, provide the Commission with the information it requires to assess the validity of their claim. A complete review of the terms and conditions of the parties' agreements, which PanAmSat has obtained from other sources, reveals why Comsat and Lockheed Martin may have been reluctant to make a full disclosure to the Commission.[44]

Attached to this petition is a declaration prepared by Professor John C. Coffee, Jr., of Columbia University, a recognized expert in corporate governance, concluding that consummating the proposed transaction would give Lockheed Martin *de facto* control of Comsat.[45] Based on his review of the relevant materials, Professor Coffee

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numerical standard (*e.g.*, shares of voting stock) are *sui generis* and must be resolved by the special circumstances presented by the facts.").

[40] See California Association of the Physically Handicapped v. FCC, 778 F.2d 823, 824 (1985).

[41] BBC License Subsidiary, 10 FCC Rcd at 7931 (quoting Benjamin L. Dubb, 15 FCC 274, 289 (1951)); Univision, 7 FCC Rcd at 6675.

[42] BBC License Subsidiary, 10 FCC Rcd at 7931; Univision, 7 FCC Rcd at 6675; Raveesh K. Kumra, 6 FCC Rcd at 3356.

[43] E.g., Application at 10 ("[t]he acquisition by Regulus of up to 49 percent of Comsat's common stock will represent only a non-controlling investment in Comsat").

[44] PanAmSat has obtained this information principally from the parties' filings with the Securities and Exchange Commission.

[45] It is conceivable that Lockheed Martin will have *de jure* control in view of the fact that it may already have an ownership interest in Comsat that will not be tallied with the shares that are tendered in response to its tender offer. See Agreement and Plan of Merger, SEC Disclosure (Appendix 1 hereto) at 47.

finds "implausible on almost any imaginable set of facts"[46] the characterization of Lockheed Martin's acquisition of 49 percent of Comsat's voting stock as a non-controlling investment.

As Professor Coffee explains in his declaration, a 49 percent block of voting stock is by itself preclusive when the remainder of the shares are broadly dispersed as in the case of Comsat.[47] Indeed, Lockheed Martin will pay a significant "control premium" for its 49 percent interest in Comsat. "Put simply, non-controlling shareholders do not pay control premiums; only controlling shareholders do."[48] In fact, Comsat's own definition of a "Change of Control" in its employee stock option plan and related agreements defines a change of control to include, among other things, any transaction that results in a change in the ownership of its voting stock of more than 40 percent.[49] To accommodate Lockheed Martin, however, these employee plans were amended expressly to exclude Lockheed Martin's acquisition of 49 percent of Comsat's stock from what would otherwise be deemed a change of control event.[50]

Professor Coffee's conclusion that the proposed transaction would give Lockheed Martin *de facto* control of Comsat also rests on the following facts:

(1) There will be a representative of Lockheed Martin on all of the major operating committees of Comsat: Compensation, Nominating, Strategic Planning, etc.[51] As Professor Coffee explains in his declaration, this representation could give Lockheed Martin at least a "blocking position" on these critical committees.[52]

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[46] See Declaration of John C. Coffee, Jr. ("Coffee Declaration"), attached hereto as Appendix 3, ¶ 5.
[47] Coffee Declaration ¶ 6(A).
[48] Id. ¶ 6(C).
[49] See Proxy Statement, SEC Disclosure at 236.
[50] See, e.g., Amended and Restated Change in Control Severance Plan, dated September 18, 1998, attached to SEC Disclosure, supra, at 203-04; Amendment to Comsat Corporation Key Employee Stock Plan, dated September 18, 1998, attached to SEC Disclosure at 213-14. The exceptions are just for the Lockheed Martin transaction. So it would appear that if the exact same transaction were agreed to with any other suitor of Comsat, that would be deemed to constitute a transfer of control, resulting in employees being able immediately to exercise special rights under these plans. Id.
[51] Shareholders Agreement, SEC Disclosure at 95.
[52] Coffee Declaration ¶ 6(E).

(2) As part of the transaction with Lockheed Martin, the employment agreements of the major executives of Comsat have all been modified "to make them economically more dependent on Lockheed [Martin]'s goodwill."[53] As a result of these amendments, the executives will be rewarded handsomely if Lockheed Martin acquires a majority of Comsat's stock.[54] These employment agreements with Comsat's key executives also leave a substantial part of their compensation to the discretion of Comsat's Compensation Committee, based on its assessment of the executives' performance.[55] The Chairman of Comsat's Compensation Committee, formerly the President and CEO of Martin Marietta Corporation, is already a Lockheed Martin director as well. [56] These factors "assure that Comsat's management will have every incentive to defer to Lockheed and also undermine their independence."[57]

(3) Comsat agrees to maintain a provision of its Articles of Incorporation that would give Lockheed Martin, with a minimum of three directors, the right to call special meetings of Comsat's shareholders and to make other changes to Comsat's Articles of Incorporation that favor Lockheed Martin should it decide to sell its interest in the company.[58]

(4) Lockheed Martin is guaranteed the selection of three directors (even if the FCC were to exercise its statutory power to ratchet down Lockheed Martin's shares below the level that would effectively ensure this right through ordinary voting procedures).[59] This "powerful coalition" on the board will give Lockheed Martin "greater than normal influence in view of the absence of other significant shareholdings."[60]

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[53] Id. ¶ 6(G).
[54] See, e.g., "Amendment to Amended and Restated Employment Agreement" between Comsat and Betty C. Alewine, its President and CEO, Exhibit 10, attached to SEC Disclosure at 148-149.
[55] See, e.g., "Amended and Restated Employment Agreement" between Comsat and Ms. Alewine, Exhibit 9, SEC Disclosure at 138.
[56] See Comsat's March 31, 1998, "Proxy Statement" ("Proxy Statement") attached to SEC Disclosure, supra, at 231 and 233.
[57] Coffee Declaration ¶ 6(G).
[58] Shareholders Agreement, Art. II, § 2.4 at 96.
[59] Id., Art. II, § 2.1 at 95.
[60] Coffee Declaration ¶ 6(D).

(5) Two current Lockheed Martin directors and one former Lockheed Martin director are already on Comsat's Board,[61] and one of the two existing Presidential appointed directors for Comsat is a lobbyist for Lockheed Martin.[62] There is no prohibition on these directors continuing as directors of Comsat, in addition to the three directors to be appointed by Lockheed Martin, so long as they are not also officers or employees of Lockheed Martin.[63] Indeed, the balance of Comsat's directors could also be directors of Lockheed Martin, as long as they were not also officers or employees of Lockheed Martin.

(6) Comsat is prohibited from taking certain actions *vis-a-vis* Intelsat, Inmarsat and New Skies, even if so instructed by the U.S. government.[64]

(7) Comsat is subject to a number of negative covenants that "basically restrict Comsat (and its subsidiaries) from taking any action outside the ordinary course of business."[65] Although some standstill provisions are common in merger agreements, the fact that it could to be years before the parties can secure Congressional approval of their proposed merger, assuming that they can secure such approval, means that "Comsat can be effectively paralyzed by these contractual constraints, as it cannot act in a fast-changing economic marketplace ... without the consent of Lockheed."[66]

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[61] SEC Disclosure at 24.

[62] Lobbying Report of Wunder, Knight, Levine, Thelan & Forscey (Aug. 10, 1998). The report, signed by Peter Knight, one of the two Presidential-appointed directors of Comsat, shows that he personally lobbied for Lockheed Martin in 1998. Mr. Knight apparently did not disqualify himself from participating in the merger decision with Lockheed Martin nor was his involvement with Lockheed Martin reported to the FCC. Compare SEC Disclosure at 24. From the beginning of 1997 (see also 1997 Lobbying Report of Wunder, Knight, Levine, Thelan & Forscey, Feb. 13, 1998), Mr. Knight's firm reports the receipt of $180,000 in lobbying expenses from Lockheed Martin.

[63] Shareholders Agreement, SEC Disclosure at 95. From the Proxy Statement, it would appear that only one of the existing Lockheed Martin directors (Mr. Bennett) would fall into this category, see SEC Disclosure at 230, and he has announced his resignation as an officer of Lockheed Martin effective as of the end of January. See *Marcus C. Bennett,* Aerospace Daily, Vol. 188, No. 17, p. 131 (Oct. 23, 1998).

[64] "Agreement and Plan of Merger" ("Merger Agreement"), attached to SEC Disclosure at 73-74.

[65] Coffee Declaration ¶ 6(F).

[66] Id.

(8) By acquiring CGSI from Comsat, "Lockheed will clearly control assets that are integral to COMSAT's business operations and future strategic development. …Because COMSAT will predictably need to work with CGSI to service its existing customers, Lockheed's control over COMSAT is further solidified. In effect, this piecemeal transfer of assets gives Lockheed the economic equivalent of a hostage by which to secure and enforce its control."[67]

(9) Lockheed Martin has ongoing special rights of access to financial information about Comsat.[68]

(10) Comsat promises not to cooperate with any other entity seeking to acquire ten percent or more of its stock.[69]

(11) Subject to legislative changes that are being sought by Comsat and Lockheed Martin, Lockheed Martin is the approved purchaser of a majority of Comsat's stock. As a result, "Comsat's management and Directors must logically view Lockheed as the future sole owner of Comsat" and they "will necessarily accord Lockheed a deference and loyalty that they might not grant to a large shareholder."[70]

In short, upon consummation of the proposed transaction, Lockheed-Martin will have the power to dominate the management of Comsat's affairs, and, therefore, the transaction constitutes a *de facto* transfer of control.[71] In the face of these facts not revealed to the FCC, Lockheed Martin's and Comsat's pledge to the FCC that Lockheed Martin will not exercise "control" until the Congress lifts the ten percent ownership cap is meaningless.

The applicants have not filed applications requesting authority to transfer control of Comsat's licenses and authorizations, or made the showings required in connection with such applications. Accordingly, the present arrangement, if

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[67] Id. ¶ 6(H). It should be noted, in this regard, that Comsat management considers CGSI, and its contracts with the federal government, to be one of Comsat's two "core businesses," the other being its "jurisdictional" business as U.S. Signatory to Intelsat and Inmarsat. See Comsat Press Release, *Comsat Adopts Strategic Plan to Refocus on Core Businesses* (Mar. 24, 1997).
[68] Shareholders Agreement, Art. II, § 2.3 at 96.
[69] Merger Agreement, SEC Disclosure, Art. VI, § 6.4(a) at 76.
[70] Coffee Declaration ¶ 6(B).
[71] Id. ¶ 21.

consummated, would constitute an unauthorized transfer of control and violate Section 310(d) and Section 214 of the Communications Act.

IV. THE ISSUES THAT THE COMSAT/LOCKHEED MARTIN APPLICATION PRESENTS ARE INEXTRICABLY INTERTWINED WITH THE ISSUES OF DIRECT ACCESS AND PRIVILEGES AND IMMUNITIES WITH WHICH THE CONGRESS IS DEALING.

A. COMSAT SHOULD NOT BE PERMITTED TO SELL ITS EXCLUSIVE ACCESS TO THE INTELSAT SYSTEM.

Under current law, Comsat enjoys a monopoly in providing Intelsat services to users within the United States. It alone acts as a gatekeeper, dictating the terms under which Intelsat capacity will be made available to U.S. carriers and end users. Comsat's monopoly was granted on the belief that monopoly would best serve the public interest as it was perceived at the dawn of the development of satellite technology — not the interests of Comsat or its shareholders.[72]

Yet while Comsat holds its monopoly essentially "in trust" for the public, it also has exploited this monopoly to advance its private commercial interests. Comsat's rates far exceed Intelsat's rates, even where Comsat provides no facilities to the customer.[73] Comsat's high markups derive from its monopoly status; at least in non-competitive markets, these markups reflect monopoly rents rather than compensation earned by Comsat.[74] In 1996, Comsat marked up Intelsat's charges for services to U.S. customers by approximately $86 million, "a mark-up of 68 percent over Comsat's payments to Intelsat."[75] While both the Commission and Congress recently have

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[72] See 47 U.S.C. §§ 701(a) & (c), 721(c)(1) & (c)(5), 741. See also Regulatory Policies Concerning Direct Access to INTELSAT Space Segment for the U.S. International Service Carriers, Report and Order, 97 FCC 2d 296 (1984), *aff'd*, Western Union International, Inc. v. FCC, 804 F.2d 1280 (D.C. Cir. 1986).

[73] E.g., Direct Access to the Intelsat System ("Direct Access NPRM"), FCC 98-280 (Oct. 28, 1998) ¶ 45 and Appendix B.

[74] E.g., Direct Access NPRM, ¶ 43.

[75] Letter, dated December 22, 1997, from Regina M. Keeney, Chief, International Bureau, to the Honorable W. J. Tauzin, Chairman, Subcommittee on Telecommunications, Trade and Consumer Protection, Attachment at p. 10.

recognized the need for restructuring Comsat's monopoly,[76] the monopoly remains in force.

Comsat has acknowledged, at least implicitly, that it believes its monopoly confers upon it material financial benefits. In the *Comsat Non-Dominant* proceeding, Comsat argued that any Commission action authorizing direct access would constitute an uncompensated "taking" in violation of the Fifth Amendment.[77] While PanAmSat disagrees with Comsat's constitutional claim, the fact that Comsat has made this argument contradicts any possible assertion by Comsat that its monopoly does not provide financial rewards.

The purchase price that Lockheed Martin has agreed to pay—first for a 49 percent interest in Comsat representing at least *de facto* control, and subsequently to own Comsat in its entirety—of necessity takes into account the potential profits arising from Comsat's existing monopoly, including Comsat's ability to charge monopoly rents in non-competitive markets. As a result, if the Commission were to allow Lockheed Martin to proceed with its proposed acquisition at this time, it would be allowing Comsat to sell a monopoly right that the FCC already has tentatively concluded no longer serves the public interest.[78]

To avoid this outcome, the Commission should not permit Lockheed Martin to acquire control of Comsat before there is direct access to Intelsat and Inmarsat for users within the United States.[79] The Commission already has instituted a proceeding to consider precisely that.[80] The Congress, moreover, is moving on legislation that would require direct access and, as stated above, the Commission should defer to such legislation. If the Commission chooses not to defer, however, it must deal with the issue of privileges and immunities as well as with direct access.

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[76] Direct Access NPRM; H.R. 1872 (passed by the House of Representatives on May 13, 1998); S.1328 and S.2365.

[77] Direct Access NPRM, ¶ 31.

[78] See id.

[79] As demonstrated in Section III, supra, Lockheed Martin's proposed acquisition of a 49 percent interest in Comsat would give Lockheed Martin *de facto* control over Comsat.

[80] See Direct Access NPRM.

B. THE COMMISSION SHOULD NOT PROVIDE FOR DIRECT ACCESS WITHOUT ADDRESSING THE ISSUE OF PRIVILEGES AND IMMUNITIES.

Authorizing direct access will not, on its own, eliminate the advantages conferred on Intelsat by its privileged status. If the Commission were to institute direct access to prevent Comsat from selling to Lockheed Martin its exclusive access to the Intelsat system, the FCC would at the same time need to address the issue of privileges and immunities. The Commission needs to ensure that Intelsat, in providing service directly to U.S. customers, not be in a position to take unfair advantage of its status as an intergovernmental organization. The Commission already has concluded, in its DISCO II Report and Order, that Intelsat's privileges and immunities benefit it unfairly vis-a-vis competing satellite providers.[81]

Taking Intelsat's special advantages into account, the Commission required Comsat to waive its privileges and immunities as a condition of entry to the U.S. domestic market, thereby preventing Comsat from importing the market-distorting effects of Intelsat's privileges and immunities.[82] For analogous reasons, the Commission should ensure that Intelsat not be able to use its privileges and immunities to evade the requirements that apply to all other service providers. There are two alternative means for the Commission to accomplish the result.

First, the Commission could require that Intelsat waive its privileges and immunities as a pre-condition to direct access. Adopting this pre-condition, however, could lead to a stalemate in which the Commission has determined that direct access is in the public interest but is unable to implement direct access because Intelsat refuses to satisfy the waiver condition.

The second alternative—which PanAmSat believes is the more prudent course—would be for the Commission to take advantage of the opportunity presented by the recent amendments to the Foreign Corrupt Practices Act.[83] There the Congress clarified in the amendments that Intelsat's quasi-governmental immunity from suit and legal process is subject to a principle that long has applied to the sovereign

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[81] DISCO II, 12 FCC Rcd 24094, 24138, 24148-49 (1997).
[82] Id. at 24149.
[83] International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998); H.R. Rep. No. 105-802, 105th Cong., 2d Sess.

immunity conferred on foreign governments. Under this principle, foreign governments do not enjoy immunity for their commercial activities, and the Congress now has clarified that Intelsat as well lacks immunity from suit or legal process for its commercial endeavors. The Commission, therefore, can and should provide that, when Intelsat engages in the commercial activity of providing satellite service directly to U.S. customers, it is subject to suit and legal process to the same extent as its commercial competitors.

In sum, Comsat was given a monopoly in providing Intelsat services to U.S. customers based upon the now outmoded belief that such a structure would best serve the public interest. It should not now be allowed to sell, for private gain, the value created by this monopoly. As a result, the Commission should consider Lockheed Martin's application, if at all, only after it has authorized direct access and taken the corollary step of ensuring that Intelsat cannot claim immunity from suit and legal process — needed to make direct access meaningful.

V. THE PROPOSED TRANSACTION COULD SUBSTANTIALLY LESSEN COMPETITION IN KEY INTERNATIONAL SATELLITE SERVICE MARKETS.

A. THE APPLICANTS WRONGLY ASSUMED THAT THEY DID NOT HAVE TO ADDRESS THE COMPETITIVE IMPACT OF THEIR PROPOSED TRANSACTION

Comsat and Lockheed Martin assert that "the Commission need not…engage in a full competitive analysis in connection with the current application."[84] They base this assertion principally on their belief that the application "involves only the acquisition of a non-controlling interest, rather than a transfer of control of Comsat."[85] Comsat and Lockheed Martin are wrong as a matter of fact and law.

As a factual matter, Comsat and Lockheed Martin simply assert that Lockheed Martin will not control Comsat. As PanAmSat demonstrates above, however, permitting Lockheed Martin to consummate its tender offer would give it *de facto* control of Comsat. For that reason alone, the applicants should be required to make a full competitive showing to the Commission.

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[84] Application at 19.
[85] Id. at 21.

In addition, as a legal matter the fact that Lockheed Martin proposes to acquire a 49 percent interest in Comsat is highly relevant to the state of competition without regard to whether Lockheed Martin has *de facto* control. The Commission's competition analysis, although not limited by the antitrust laws, is "informed by antitrust principles."[86] Under the antitrust laws, if an acquisition of the stock of another corporation would substantially lessen competition, then the acquisition violates Section 7 of the Clayton Act.

This principle applies without regard to whether the interest that the purchaser acquires is a controlling interest. As the Supreme Court has held, "[a] company need not acquire control of another company in order to violate the Clayton Act."[87] For example, one court held that an acquisition of stock sufficient to elect one member of a competitor's board of directors violated Section 7, reasoning that "minority representation, because of the opportunity thereby afforded to persuade or to compel a realization of the full vigor of...competitive effort would come within the ban of Section 7."[88] The Second Circuit Court of Appeals came to the same conclusion when it affirmed the granting of a preliminary injunction preventing a brewery from acquiring a 29 percent interest in a competitor.[89] The court noted that the acquisition at issue, a 29 percent interest in Schaefer, "might give Schmidt the opportunity to eliminate price competition between the two companies, lending to higher prices profits for them at the expense of a large segment of the beer-drinking public."[90]

Even without board representation, mere stock ownership has been found to substantially lessen competition. In American Crystal Sugar Co. v. Cuban-American Sugar Co., the district court permanently enjoined a corporation that had acquired a 23 percent stake in a direct competitor from voting those shares and from seeking board representation.[91] The court noted that a union of competitors is "inimical to independent pricing policies, price flexibility and the dispersion of market power."[92]

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[86] Nynex Corp. and Bell Atlantic Corp., 12 FCC Rcd 19985, 20003 (1997).
[87] Denver & Rio Grande W.R.R. Co v. United States, 387 U.S. 485, 501 (1967).
[88] Hamilton Watch Co. v. Benrus Watch Co., 114 F. Supp. 307, 317 (D. Conn.), aff'd, 206 F.2d 738 (2d Cir. 1953).
[89] F&M Schaefer Corp. v. C. Schmidt & Sons, Inc., 597 F.2d 814 (2d Cir. 1979) (per curiam).
[90] Id. at 819.
[91] 152 F. Supp. 387 (S.D.N.Y. 1957), aff'd, 259 F.2d 524 (2d Cir. 1958).
[92] Id. at 400-401.

These legal precedents have a solid foundation in economic principles. As discussed in the attached economic analysis, prepared by Economists Incorporated ("EI Statement"),[93] the "acquisition of a partial or 'non-controlling' equity interest in one firm by a competing firm has an anticompetitive effect on the pricing incentives of the acquiring firm, and thus will increase both firms' prices."[94] Following such an acquisition, "[t]he acquiring firm has an incentive to raise its prices because to do so increases the profits of the rival in which it enjoys an interest."[95] Whether controlling or not, therefore, Lockheed Martin's proposed 49 percent interest in Comsat should be scrutinized for anti-competitive consequences.

The applicants also disclaim the need for a competitive analysis based on the facts that: (i) "Lockheed Martin has no operational satellites," and (ii) there are many competitors in the satellite industry.[96] Neither of these facts, however, bears the significance that Comsat and Lockheed Martin ascribe to it.

Although Lockheed Martin may have no operational satellites, it undeniably is poised to enter the satellite market. As addressed elsewhere in this Petition, Lockheed Martin has entered into joint ventures with Intersputnik and GE, and the Commission has authorized it to launch and operate a Ka-band satellite system. These circumstances make Lockheed Martin a potential competitor at the very least, and possibly an actual competitor given the commitments it has made to entering the market. In either event, Lockheed Martin's planned operations need to be taken into account for competitive purposes.[97]

The presence of a number of satellite competitors, moreover, does not negate the fact that there are satellite routes and services that are not competitive. In fact, the Commission has found that Comsat has market power with respect to providing switched voice and private line services between the United States and 63 countries, and in connection with providing occasional-use video services between the United States and 142 countries.[98]

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93 The EI Statement is attached to this Petition as Appendix 4.
94 EI Statement at 8.
95 Id. at ii.
96 Application at 21.
97 See EI Statement at 9.
98 Comsat Corporation, 13 FCC Rcd 14083 (1998).

Overall, Comsat exerts dominance over switched voice/private line services, occasional-use video services, or both, in some 148 countries having a total population of 2.8 billion persons.[99] That is nearly half the world's population. Comsat's dominance extends to over 2.6 billion persons and 26 million square miles of territory in the case of occasional-use video services, and nearly 600 million persons and over 11 million square miles of territory in the case of switched voice and private line services.[100] Even taking into account the presence of competitors , Comsat is a dominant player in many service sectors and a combination between Comsat and company the size of Lockheed Martin must be scrutinized for its competitive impact.

B. THE APPLICATION RAISES COMPETITIVE CONCERNS

The Commission has well-defined criteria, which it has developed principally in the context of mergers and acquisitions, for evaluating whether a transaction between two companies would have anti-competitive consequences.[101] In the case of transactions raising horizontal concerns, the Commission first defines the relevant markets and identifies the market participants.[102] Once these tasks have been accomplished, the Commission evaluates the effects of the transaction on competition in the markets as defined, "such as whether the merger is likely to result in either unilateral or coordinated effects that enhance or maintain...market power."[103] The Commission has applied the same analysis in cases involving markets served by satellite systems.[104]

Applicants bear the burden of proof of demonstrating that the competitive aspects of their proposed transactions are in the public interest.[105] "Failure to carry the burden of proof means the Commission must deny the applications or designate them for hearing."[106] It is appropriate that the burden of proof rests with the applicant because, among other reasons, many of the facts that bear upon a competitive analysis are within the possession of the applicant.

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99 See "1998 Information Please Almanac, "World Statistics at 175.

100 See id.

101 See generally Nynex, 12 FCC Rcd at 19985.

102 Id. at 20008.

103 Id. at 20009.

104 See Application for Transfer of Control of MCI Communications Corporation to WorldCom, Inc., 13 Comm. Reg. (P&F) 477, 502, 519 (1998).

105 Nynex, 12 FCC Rcd at 20007.

106 Id.

The fact that Comsat and Lockheed Martin have not made a competitive analysis, therefore, is grounds for dismissing their application. In addition, this omission makes it difficult for interested parties to secure the facts they need to comment fully upon competitive issues. The facts that are available to PanAmSat, however, suggest that the proposed transaction could substantially lessen competition.

As discussed in the attached EI Statement, consummation of Lockheed Martin's tender offer would give "Comsat, Intelsat, Lockheed Martin and Intersputnik...an economic community of interest" that would "raise[] serious antitrust issues."[107] To put these concerns in context, the Department of Justice and Federal Trade Commission's 1992 Horizontal Merger Guidelines presume that if a post-merger Herfindahl-Hirschman Index ("HHI") is above 1800, a merger that increases the HHI by more than 100 points is "likely to create or enhance market power or facilitate its exercise."[108] In the Euro-Asian market, Economists Incorporated has found, consummation of the proposed tender offer would, viewed from one perspective, increase the HHI by more than 1,000 points, from 2,110 to 3,140.[109] Looked at from a slightly different perspective, the increase would be from 1,930 to 3,410.[110]

These figures are cause for concern, particularly when one considers that "of the 142 countries where Comsat is still dominant in the [provision of] occasional-use video services, 61 or 43 percent are in the Euro-Asian region," and that "of the 63 countries where Comsat is still dominant in the [provision of] switched and private line services, 15 or 24 percent are in this region."[111] Accordingly, the Commission should at a minimum require Lockheed Martin to present a complete analysis of the impact that their proposed transaction would have on competition.

VI. COMSAT HAS NOT PRESENTED EVIDENCE PERMITTING AN INFORMED JUDGMENT AS TO WHETHER COMMON CARRIERS, DIRECTLY OR INDIRECTLY, ALREADY OWN MORE THAN ONE PERCENT OF ITS STOCK.

Pursuant to Section 304(b)(2) of the Satellite Act,[112] communications common carriers may hold shares of Comsat stock only if they are "authorized carriers."

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107 EI Statement at 13.
108 Nynex, 12 FCC Rcd at 20056 n.268 (citing 1992 Horizontal Merger Guidelines).
109 EI Statement at 12.
110 Id.
111 Id. at 12..
112 47 U.S.C. § 734(b)(2).

However, even authorized carriers, as a group, may not hold more than 50 percent of Comsat's stock.[113] The proposed acquisition of 49 percent of Comsat's stock by Lockheed Martin, assuming for purposes of argument that Lockheed Martin were eligible to become an "authorized carrier," necessarily raises issues regarding the ownership of the remaining 51 percent of Comsat's stock. There is no indication in the application that these issues have been addressed in any meaningful way.

Following the proposed initial investment by Lockheed Martin, a single authorized carrier would hold 49 percent of Comsat's stock. If other authorized carriers were to hold even 1.1 percent of Comsat's stock, the proposed transaction would result in a violation of Section 304(b)(2). As best as one can determine from the parties' application, however, Comsat has made no attempt to ascertain whether, and to what extent, any of the beneficial owners of its stock are communications common carriers that should have applied to the Commission to become "authorized carriers."[114] This failure renders the Commission powerless to evaluate compliance with Section 304(b)(2).

There are literally thousands of communications common carriers that conceivably could own Comsat stock. In the five-month period between June and October of 1998 alone, by PanAmSat's count, the Commission granted Section 214 authority to over 300 international common carriers. In addition, there are numerous domestic interexchange carriers in the United States. The vast number of companies that are communications common carriers makes it likely that some of Comsat's shareholders fit within that category.

In analogous circumstances, the Commission long has required publicly-held companies to demonstrate — normally through statistical analysis of an ownership survey — that they comply with the foreign ownership limitations set forth in Section 310(b) of the Communications Act, 47 U.S.C. § 310(b).[115] Comsat should have

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[113] Id.

[114] A *de minimis* portion of Comsat's stock is held by communications common carriers that the Commission has qualified as authorized carriers. According to Comsat's SEC filing, authorized carriers hold 18,984 (approximately .037 percent) of Comsat's shares. Proxy Statement, SEC Disclosure at 228.

[115] See, e.g., In re HLT Corp. and Hilton Hotels Corp., 12 FCC Rcd 18144, 18152-18153 (1997); In re Applications of Nextwave Personal Communications, Inc., 12 FCC Rcd 2030-2074 (1997); In re Request of MCI Communications Corp. British Telecommunications PLC, 9 FCC Rcd 3960 (1994).

conducted a comparable survey of its public shareholders prior to the filing of its application.

Even with respect to Comsat shares held in a broker's street name, in trust accounts, and in other arrangements that do not, on their face, reveal the identity of the beneficial owner of the stock, Comsat is able to learn the identity of the beneficial owner and, therefore, should be required to do so and to certify to the Commission that these owners do not hold common carrier authorizations. Comsat would face a high hurdle under Section 304 if even a relatively small percentage of Comsat's stock were so held.

In fact, it is evident from the materials Comsat has filed with the SEC that a significant portion of Comsat's stock is held in the name of someone other than the beneficial owner of the stock. The SEC filing states that Comsat's largest stockholder, Capital Group Companies, Inc., "disclaims beneficial ownership of all of the shares reported."[116] There are no doubt many other Comsat shareholders of record that are not the beneficial owners of their shares.

Further, Section 304 provides that no more than 50 percent of Comsat's stock may be held by authorized carriers "directly or indirectly through subsidiaries or affiliated companies, nominees, or any persons subject to [their] direction or control." Thus, it is not sufficient for Comsat to identify the beneficial owners of its stock; it also must apply principles of attribution to determine whether those shares are, in fact, owned "indirectly through subsidiaries or affiliated companies, nominees, or any persons subject to" the direction or control of an authorized carrier. Comsat has done neither.

In short, the proposed acquisition of 49 percent of the stock of Comsat by Lockheed Martin dramatically increases the chance that the limits established in Section 304 will be violated. Comsat, however, fails even to address the issue in its application, much less make a substantial showing that an effort has been made to survey the ownership of Comsat's publicly-held shares and to police compliance with Section 304. On this basis alone, the application should be denied.

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[116] Proxy Statement, SEC Disclosure at 228.

VII. THE PROPOSED TRANSACTION WOULD CONFLICT WITH COMSAT'S DUTIES AS THE UNITED STATES SIGNATORY TO INTELSAT AND INMARSAT.

As set forth above, consummation of the proposed transaction would give Lockheed Martin effective control of Comsat and make Comsat but a single part of the extended Lockheed Martin corporate family. If this were to happen, the private interests of Comsat/Lockheed Martin would conflict with the public duties that Comsat has as the United States Signatory to Intelsat and Inmarsat, thereby undermining Comsat's ability to carry out its public interest mandate.

Comsat was conceived as a quasi-governmental corporation, subject to significant governmental oversight, and charged with specific public interest duties. Among other things, Comsat has been entrusted as the U.S. Signatory to Intelsat and Inmarsat to exercise Signatory functions along with other governmental and quasi-governmental entities. The Signatories oversee the management of the Intelsat and Inmarsat systems.

Based on its Signatory role, and because of Comsat's public interest responsibilities, Congress conferred upon Comsat extraordinary powers and privileges, which have become increasingly controversial as Comsat has expanded into non-jurisdictional lines of business. The Satellite Act mandates that, in exchange for receiving these powers and privileges, Comsat subordinate its private interests to the public policies that are embodied therein. Section 403 of the Satellite Act, 47 U.S.C. § 743, prohibits Comsat from engaging in "any action, practices, or policies inconsistent with the policies and purposes declared in Section 102 of this [Satellite] Act." Section 102 of the Satellite Act, 47 U.S.C. § 701, states that these policies and purposes include making the Intelsat system "responsive to public needs and national objectives," contributing "to world peace and understanding," making "efficient and economical use of the electromagnetic frequency spectrum," affording "nondiscriminatory access to the system," fostering "maximum competition ... in the provision of equipment and services utilized by the system," and operating so as "to maintain and strengthen competition in the provision of communications services to the public."

Over the years, the lines between Comsat's role as a market participant and its role as a quasi-governmental body with public interest obligations have blurred,

making government regulation and oversight of Comsat more problematic. The Commission has had occasion to confront the inevitable conflicts between Comsat's mandate to serve the public interest and its own economic interests, principally when Comsat has sought to enter businesses separate from its "jurisdictional" role as the Intelsat and Inmarsat Signatory. The test that the Commission established almost twenty years ago remains viable today: Comsat may not engage in non-jurisdictional activities if they "hinder or interfere with Comsat's performance of its duties. Comsat may not engage in activities that are inconsistent with its statutory mission or will interfere with or hinder realization of the [Satellite] Act's purposes and objectives."[117]

The agreements between Comsat and Lockheed Martin would turn upside down the relative priorities that the Satellite Act and the Commission's decisions envision, making Comsat's private interests preeminent and the public's interest subordinate. Section 6.2 of the Agreement and Plan of Merger between the companies, dated September 18, 1998, as filed with the SEC, prohibits Comsat from taking certain actions with respect to Intelsat, Inmarsat, and New Skies, even if the U.S. Government instructs it otherwise. Except as instructed by the U.S. government, moreover, Section 6.2(d) flatly prohibits Comsat from taking any action that would materially impair the value of its interests in Intelsat and Inmarsat. If there is a conflict between Comsat's private commercial interests and the public interest, therefore, Section 6.2(d) suggests that Comsat must choose the former otherwise the Lockheed Martin transaction would be in jeopardy. Comsat should not be permitted to abrogate its public responsibilities in this fashion.

In addition, the proposed transaction with Lockheed Martin will create a situation in which conflicts between Comsat's public duties and its private economic interests will become commonplace and intractable, because Lockheed Martin is involved in many activities that conflict with Comsat's jurisdictional role. If Comsat were to become part of a broadly diverse corporation such as Lockheed Martin,

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[117] In re Comsat Study — Implementation of Section 505 of the International Maritime Satellite telecommunications Act, 77 F.C.C.2d 564, 610 (1980). The continuing validity of this test was confirmed in 1994. See In re Petition of Motorola Satellite Communications, Inc. for Declaratory Ruling Concerning Participation by Comsat Corporation in a new Inmarsat Satellite System Designed to Provide Service to Handheld Communications Devices, 9 FCC Rcd 7693 (1994). In that decision, the Commission distinguished between the general test for non-jurisdictional activities articulated in the Comsat Study and a more rigorous test for non-jurisdictional activities that involve the use of Intelsat or Inmarsat facilities.

therefore, the potential for conflict as a result of Comsat's dual roles would increase dramatically. The fox already is guarding the hen-house — the proposed transaction would add to the size, number of teeth, and the appetite of the fox.

For example, Lockheed Martin is a party to a joint venture with Intersputnik[118] to provide worldwide satellite communications, competing with the Intelsat system. Thus, while Comsat is responsible for voting the U.S. interests as the Signatory to Intelsat, and indeed has the largest ownership stake in Intelsat, it would have an economic incentive to protect the Intersputnik system. Comsat cannot be expected to be an effective advocate of U.S. government policies under those circumstances. Similarly, Comsat would be called upon to make decisions concerning Intelsat and Inmarsat procurements in which it should be voting based on what is in the best interests of those organizations. It would, however, also have a private commercial incentive to favor proposals presented by Lockheed Martin. These interests are irreconcilable.

Lockheed Martin, moreover, has a substantial ownership interest in Loral Space and Communications Ltd. ("Loral Space"). As of September 1, 1997, this interest represented "approximately 16 percent of Loral Space's shares on a fully diluted basis."[119] As the Commission is aware, Loral Space owns and operates one of the world's largest geostationary satellite systems; is a major manufacturer of satellites and satellite equipment; and is a principal owner of the Globalstar nongeostationary orbit satellite system. The proposed connections between and among Comsat, Lockheed Martin, and Loral Space are rife with the potential for conflicts of interest.

Lockheed Martin also recently won a $3.4 billion contract from the National Aeronautics and Space Administration to manage all of NASA's data collection, measurement and communications operations, including the TDRSS satellites that Columbia Communications leases to provide international satellite services in competition with Comsat.[120]

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[118] Intersputnik is an international intergovernmental organization that operates a global commercial satellite-based telecommunications system.

[119] In the Matter of Administration of the North American Numbering Plan, 12 FCC Rcd 23040, 23063 n.144 (1997).

[120] *Lockheed Martin's Victory in CSOC Race is a Blow to Boeing Space Operation*, Space Business News, Vol. 16, No. 20 (Sept. 30, 1998); Nancy Lofholm, *Political Power Migrates West to Wheel, Deal*, The Denver Post (Sept. 27, 1998) at A1; *Lockheed Wins 10-Year NASA Contract; Contractor*

Lockheed Martin, which employs more than 170,000 people worldwide and had 1997 revenues of $28 billion, is many times the size of Comsat, whose 1997 revenues were well under $1 billion. It is far more likely, therefore, that Comsat's jurisdictional role will be swallowed whole by the much larger interests of Lockheed Martin, and subordinated to those interests, than it is that Lockheed Martin's investment in Comsat will make it "the very large tail of a relatively small dog."[121]

In any event, the conflicts that will arise under Section 6.2 are merely a specie of the many different conflicts that inevitably will occur if the U.S. Signatory becomes economically dependent upon, and bound to, a corporation as large and diversified as Lockheed Martin. In that situation, Comsat cannot reasonably be expected to resolve these conflicts in the best interest of the United States. The proposed transaction, therefore, will undermine Comsat's ability to fulfill its public responsibilities under the Satellite Act.

viii. the proposed transaction would undermine the independence of lockheed martin as the north american numbering plan administrator and the local number portability administrator.

Pursuant to Section 251(e)(1) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), the Commission was required to designate an impartial entity to administer telecommunications numbering. In implementing this provision, the Commission established certain criteria that would guide the selection of numbering administrators, one of which is the so-called "neutrality" principle. Thus, for instance, pursuant to Section 52.12(a) of the Commission's rules, 47 C.F.R. § 52.12(a), the North American Numbering Plan Administrator ("NANPA") must be "impartial and not aligned with any particular telecommunications industry segment."

Specifically, the Commission's rules provide that the NANPA may not be an affiliate of (*i.e.*, be controlled by, control, or be under common control with) any telecommunications service provider, 47 C.F.R. § 52.12(a)(i), and that neither the NANPA nor any of its affiliates may "derive a majority of its revenues from[] any telecommunications service provider." 47 C.F.R. § 52.12(a)(1)(ii). Further, whether or not disqualified by the foregoing criteria, no entity that is "subject to undue influence

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Picked to Run Agency's Space Operations, The Daily News of Los Angeles, AV edition, p.AV2, (Sept. 29, 1998).

[121] In re Petition of Motorola, 9 FCC Rcd 7693, 7708 (1994).

by parties with a vested interest in the outcome of the numbering administration and activities" may serve as the NANPA. 47 C.F.R. § 52.12(a)(1)(iii).

One year ago, the Commission approved the selection of Lockheed Martin as the NANPA.[122] At that time, the Commission reiterated the importance of the "neutrality" principle, noting that the NANPA "should not unduly favor or disadvantage any particular industry segment or group of consumers."[123] Indeed, Bellcore was eliminated from contention precisely because it was deemed to be too closely aligned with the wireline telephone industry.[124]

With respect to Lockheed Martin's "neutrality," the Commission found that Lockheed Martin's affiliation with Loral SKYNET resulted in a "technical violation" of the neutrality principle.[125] However, the Commission found this violation to be *de minimis* because the "customers of these SKYNET services constitute a discrete, specific group of former AT&T customers [who generally] do not use North American Numbering Plan resources and, therefore, the service offerings do not jeopardize the neutrality of Lockheed Martin."[126] The Commission concluded that:

> In view of the *de minimis* nature of the common carrier services currently offered by Loral SKYNET, the extremely small financial stake of the Lockheed Martin Corporation in Loral SKYNET relative to the Lockheed Martin Corporation's overall assets, and the conclusion of the [North American Numbering Council] that Lockheed is neutral, we conclude that Lockheed Martin may serve as the NANPA without compromising the purposes of the statute and the resulting neutrality criteria.[127]

For similar reasons, Lockheed Martin was selected to be a Local Number Portability Administrator ("LNPA").[128]

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[122] See In the Matter of Administration of the North American Numbering Plan, 12 FCC Rcd 23040 (1997).
[123] Id. at 23044.
[124] Id. at 23043.
[125] Id. at 23080.
[126] Id.
[127] Id. at 23081.
[128] See In the Matter of Telephone Number Portability, 12 FCC Rcd 12281, 12303, 12349 (1997) ("We wish to underscore, however, that we remain committed to ensuring that numbering portability administration is carried out in an impartial manner.").

Lockheed Martin's purported neutrality as the NANPA and the LNPA must now be reevaluated in light of its proposed affiliation with Comsat. Indeed, the proposed transaction not only "raises concerns about Lockheed Martin's neutrality,"[129] but would, if consummated, undermine the very basis upon which Lockheed Martin was selected as the NANPA and the LNPA.

By the terms of the proposed transaction, Lockheed-Martin will acquire control of Comsat, an FCC common carrier. Comsat provides a variety of satellite-delivered telecommunications services that are interconnected with the PSTN; it derives a large portion (if not a majority) of its revenues from telecommunications services; and its customers use numbering resources on more than an incidental basis.

Thus, whether or not Lockheed Martin's investment in SKYNET resulted in a *de minimis* violation of the neutrality principle, the same cannot be said of its investment in Comsat. Lockheed Martin cannot be, through its investment in Comsat, a market participant whose fortunes turn on the use of numbering resources and an independent numbering administrator at the same time.

IX. CONCLUSION

As shown above, the application that Lockheed Martin and Comsat have presented to the Commission is incomplete and flawed. The applicants seek to have the Commission ignore the careful ownership structure built by the Congress in the Satellite Act and permit the sale at a premium of the unique, quasi-public entity created by the Act. The Commission should not permit the applicants to subvert the Satellite Act in this manner.

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[129] Report to the North American Numbering Council and the Telecommunications Industry Concerning Lockheed Martin's Global Telecommunications Subsidiary, FCC Website (Oct. 2, 1998).

Only the Congress can make the changes and create the conditions that would make the Lockheed Martin acquisition of Comsat appropriate and in the public interest. The FCC should defer to the Congress and await legislation that will create a new ownership paradigm for Comsat.

Respectfully submitted,

PANAMSAT CORPORATION

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Its Attorneys

November 23, 1998

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition to Deny of PanAmSat Corporation was sent by hand, postage prepaid, this 23rd day of November, 1998, to the following:

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Susan Jamieson

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	
	)	
LOCKHEED MARTIN CORPORATION / REGULUS, LLC	)	File No. SAT-ISP-19981016-00072
	)	
For Authority to Acquire Up To 49 Percent of the Stock of Comsat as an Authorized Carrier Under the Communications Satellite Act of 1962	)	
	)	
COMSAT GOVERNMENT SERVICES, INC. Authority to Transfer Control of Comsat Government Services, Inc. to Regulus LLC, a Wholly-Owned Subsidiary of Lockheed Martin Corporation	)	File Nos. SES-T/C-19981 and ITC-T/C-19981016-00715

REPLY OF PANAMSAT CORPORATION

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January 15, 1999

EXECUTIVE SUMMARY

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	)	
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For Authority to Transfer Control of Comsat Government Services, Inc. to Regulus LLC, a Wholly-Owned Subsidiary of Lockheed Martin Corporation	)	ITC-T/C-19981016-00715

REPLY OF PANAMSAT CORPORATION

PanAmSat Corporation ("PanAmSat"), by its attorneys, hereby replies to the oppositions filed by Lockheed Martin Corporation and Regulus, LLC ("Lockheed Martin"), and by Comsat Corporation ("Comsat") (collectively the "Opponents" or the "Applicants"), to PanAmSat's petition to deny (the "Petition") the above-captioned applications (the "Applications").

I. LOCKHEED MARTIN'S ACQUISITION OF 49 PERCENT OF COMSAT AS AN "AUTHORIZED CARRIER" WOULD RENDER MEANINGLESS THE STATUTE'S OWNERSHIP RESTRICTIONS.

A. OVERVIEW.

PanAmSat demonstrated in its Petition that the 1962 Satellite Act requires the broad dispersal of ownership in Comsat. No member of the general public, specifically to include aerospace companies, may hold more than ten percent of Comsat stock. The one exception, for "authorized carriers," was designed to allow international common carriers, in particular AT&T, to take a larger stake in Comsat, because it was felt that such carrier participation was necessary — a necessary good for some, a necessary evil for others — to make the infant Comsat viable. Over time, the "authorized carrier"

provision of the statute has become outmoded; as the FCC said, a provision that has served its purpose and is no longer required.[130]

In response, the Opponents take a mechanistic approach and argue that the "authorized carrier" ownership exception is still on the books and cannot be ignored. PanAmSat never said that it had been repealed by the Congress or could be ignored by the Commission. All PanAmSat said is that the Commission should look to what the Congress intended as to who would be classified an "authorized carrier" and determine whether the public interest permits Lockheed Martin to own nearly 50 percent of Comsat's stock as an authorized carrier.

As Comsat has argued in its comments in the Commission's direct access proceeding:

> statutory language must be read with common sense to avoid absurd results — and to accord with a holistic understanding of lawmakers' objectives and policy as embodied within the statutory scheme and the legislative history.[131]

Taking such an approach, PanAmSat believes that, shortly after passage of the 1962 Act, even if no carrier had come forward to acquire Comsat's stock, Lockheed Corporation, as Lockheed Martin was known in 1962, would not have been deemed an "authorized carrier" and would not have been permitted to own more than 10 percent of Comsat's stock. The Commission cannot eliminate this outmoded ownership provision, but it also cannot interpret it in a way that the Congress never intended.

B. LOCKHEED MARTIN SHOULD NOT BE CLASSIFIED AS AN "AUTHORIZED CARRIER."

Lockheed Martin argues, in the alternative, that it should be classified as an "authorized carrier" because either:

> (1) it requires no more to be an "authorized carrier" than to be a common carrier,[132] a test Lockheed Martin says it could meet "in a

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[130] See Establishment of Domestic Communications-Satellite Facilities by Non-Governmental Entities, 35 F.C.C.2d 844, 847-54 ("Second Report and Order on Domestic Satellites"), recon, 38 F.C.C.2d 665, 679-80 (1972); accord Implementation of Section 505 of the International Maritime Satellite Telecommunications Act, 74 F.C.C.2d 59, 67 n.6 (1979).

[131] In the Matter of Direct Access to the Intelsat System, IB Docket No. 98-192, Comments of Comsat ("Comsat Direct Access Comments") at 6-7 (citations omitted).

[132] Lockheed Martin Opposition at 12.

> variety of ways, including the acquisition of common carrier facilities or by becoming a reseller of common carrier services;"[133] or
>
> (2) if a more substantial showing is required to establish oneself as an authorized carrier, Lockheed Martin's "involvement in the aerospace industry" satisfies this additional public interest hurdle.[134]

Unfortunately for Lockheed Martin, two bad arguments do not make one good one.

1. "Authorized Carrier" Is Not Synonymous With "Communications Common Carrier."

Neither the statute nor its legislative history supports the notion that all that is required to be an "authorized carrier" is to be a "communications common carrier" under the Communications Act. Although being a communications common carrier is a pre-condition to being deemed an authorized carrier, the latter term does not define the former.[135] Congress did not regard the two terms as interchangeable. The statute states:

> the term "authorized carrier", except as otherwise provided for purposes of section 304 by Section 304(b)(1), means a communications common carrier which…[136]

The determination of whether a particular communications common carrier should be deemed an "authorized carrier," and entitled to special ownership privileges in Comsat, requires an additional public interest determination by the Commission.[137] This determination is more than the usual public interest determination that an entity is qualified to be a communications common carrier, otherwise there would be no need for a separately defined term.

It strains credulity, moreover, to think that this carefully considered legislation — fought primarily over the very issue of the special ownership right of carriers — created rigorous restrictions on the general ownership in Comsat, but contains an

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133 Id. at 12 n.26.
134 Id. at 20-21.
135 47 U.S.C. § 734(b)(1).
136 Id. § 702(7) (Emphasis added).
137 Id. § 734(b)(1).

exception to these restrictions so broad that virtually any company could qualify by the simple expedient of obtaining a Section 214 authorization, no matter how trivial. To quote Comsat's direct access comments again:

> a 'mechanical reading' that fails to examine the literal words in view of the language and structure of the Act as a whole is insufficient. As a matter of statutory construction, the FCC may not wrench discrete clauses of the Satellite Act out of context, and thereby interpret the Act to produce 'a result demonstrably at odds with the intent of Congress.'[138]

2. Lockheed Martin's Reading Of The Legislative History Is Highly Selective.

The legislative history of the Satellite Act — its whole history and not snippets quoted out of context — makes clear that the ownership structure created by the Congress was a compromise between those who wanted Comsat ownership to be entirely in the hands of the international carriers and those who wanted ownership to be widely dispersed. The compromise was to "split the difference":

> a dichotomy between the carriers on the one hand, who have extensive experience in communications operations to contribute to the corporation and will be the principal customers of the corporation …and the general public [on the other].[139]

Lockheed Martin and Comsat again eschew the holistic and point the Commission to only half the story — the Congressional resistance to the FCC's initial proposal that only international carriers own Comsat. Thus, Lockheed Martin quoted the statements of Assistant Attorney General Katzenbach[140] and Senator Morse and

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[138] See Comsat Direct Access Comments at 6-7 (citations omitted).

[139] Statement of the bill's floor manager, Senator Pastore, 108 Cong. Rec. 15821 (1962). In its Direct Access pleading, Comsat takes a very different view as to the meaning of an "authorized carrier" than it does for purposes of this proceeding. Comsat Direct Access Comments, Statutory Analysis Appendix at 56. Indeed, Comsat adds some additional helpful legislative history from the Senate Commerce Comm. report on the legislation:

> "The specific measures in this respect are to blend ownership by the public with ownership by communications common carriers, who will be the principal users of the corporation's facilities and so have a vital stake in the success and efficiency of the corporation."
> Id. (emphasis Comsat's), quoting 1962 Senate Commerce Comm. Report at 11 (June 11, 1962).

[140] Lockheed Martin Opposition at 20.

other members of Congress who signed the "Morse Letter"[141] only to the effect that special ownership privileges should not be reserved to a select group of carriers. But Lockheed Martin did not disclose that these statements were made in response to the initial FCC proposal and not to the final bill.[142]

Similarly, the Congressional Staff Report, cited by Lockheed Martin to show that there was opposition to the FCC's initial proposal to reserve all of Comsat's stock for international carriers, concludes by emphasizing the importance of encouraging the involvement of "private communications common carriers with international interests" in the ownership of Comsat. Lockheed Martin did not cite the portion of the Staff Report that stated that the key regulatory factor will be that "the owners…are also customers and engaged in business requiring the service of the company."[143] Moreover, unlike the background section of the Staff Report quoted by Lockheed Martin, the whole Report summarizes the legislation in substantially the form in which it was eventually passed.

The half truths of Lockheed Martin's Opposition are shown again in its reliance on a letter from President Kennedy to support Lockheed Martin's assertion that no special ownership privileges were intended for the international common carriers.[144] In that letter, President Kennedy cited the merit of unrestricted public ownership of Comsat (which Lockheed Martin cites) and the important role of the international carriers (which Lockheed Martin ignores), and concludes that "[t]o meet all of these objectives," a two tiered stock approach should be adopted.[145]

Finally, the legislative history cited by Lockheed Martin for the proposition that authorized carriers might include domestic common carriers is both irrelevant and utterly unsupportive of the proposition that an entity without international common carrier experience could acquire nearly 50 percent of Comsat's stock as an authorized carrier. For example, Lockheed Martin refers to a colloquy between Senator Pastore and FCC Chairman Minow in which Senator Pastore asked whether the definition of

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[141] Id. at 13.

[142] See An Act for the Establishment, Ownership, Operation, and Regulation of a Commercial Communications Satellite System, and For Other Purposes: Hearings on H.R. 11040, Before the Senate Comm. on Foreign Relations, 87th Cong., 2nd Sess. 54 (1962).

[143] Staff of Senate Comm. on Aeronautical and Space Sciences, "Communications Satellites: Technical Economic and International Developments," 158 (Staff Rept. 1962).

[144] Lockheed Martin Opposition at 19 n.50.

[145] See Letter from President Kennedy to Lyndon Johnson and Rep. John McCormack (Feb. 7, 1962), reprinted in House Report No. 1636 at 17 (1962).

authorized carrier" would not include "every single communications common carrier" and Chairman Minow says: "Not necessarily," that the FCC had always contemplated authorized carriers as the international carriers.[146] After much heated debate on the subject, Senator Pastore concluded by stating that domestic carriers could participate in the ownership of Comsat:

> where such ownership will not defeat the structural balance between the carriers who have a special expertise to contribute and those investors whose principal motivation is corporate profits rather than service.[147]

Apparently, neither Senator Pastore nor Chairman Minow thought that the "authorized carrier" exception could be used to ignore this balance entirely, as Lockheed Martin now proposes the Commission should do.

Given the words of the statute — the express legislative intent that shares of stock in the corporation be sold in a manner "to encourage the widest distribution"[148] and the Commission's power to promote "the widest possible distribution of stock among authorized carriers,"[149] it is quite remarkable for Lockheed Martin to suggest that its acquisition of nearly 50 percent of Comsat's stock should raise no special public interest concern. Further, while Lockheed Martin contents itself in citing some generalized statements given by FCC Chairman Minow and others at the time about what was understood by the public interest showing,[150] Chairman Minow was, in fact, far more direct. Thus, when asked whether the FCC would find it in the public interest to allow a "carrier" to buy up all of the stock reserved for authorized carriers, Chairman Minow responded:

> I find it difficult to see a circumstance where the public interest would be served by giving one carrier an excessively dominant share" [of the stock reserved for authorized carrier ownership].[151]

To drive home the point, Senator Kefauver followed:

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[146] Communications Satellite Legislation, Hearings before the Senate Comm. on Commerce on S.2814 (as amended by Space Comm.), 87th Cong., 2nd Sess. 102 (1962) (cited by Lockheed Martin at 13 n.31).
[147] 108 Cong. Rec. at 15821 (1962).
[148] 47 U.S.C. § 734(a).
[149] Id. § 734(f).
[150] Lockheed Martin Opposition at 22.
[151] Antitrust System Problems of the Space Satellite Communications Hearings before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, pursuant to S. Res. 258 part 2, 87th Cong., 2nd Sess. 339 (1962) (Minow).

> Mr. Minow says he does not want one carrier having 40 or 45 percent of the stock set aside for carriers.[152]

Lockheed Martin's protestations to the contrary, that understanding of the public interest has guided the Commission's governance of Comsat, including its pressure for AT&T to relinquish its 29 percent share, ever since.[153]

II. BASED ON THE TOTALITY OF THE CIRCUMSTANCES, THE PROPOSED TRANSACTION WOULD RESULT IN AN UNAUTHORIZED TRANSFER OF CONTROL.

A. *DE FACTO* CONTROL RESULTS FROM THE CUMULATIVE EFFECT OF MANY INDIVIDUAL FACTORS.

As shown in PanAmSat's Petition, Lockheed Martin's proposed acquisition of 49 percent of the stock of Comsat, along with the associated rights that it would acquire, would give Lockheed Martin *de facto* control of Comsat. In response, Lockheed Martin and Comsat attempt to unscramble the control "omelet" and show that no single ingredient, taken alone, would constitute *de facto* control. For example, they go to great lengths to demonstrate that the "size of Regulus's proposed interest in Comsat is not dispositive,"[154] and that the number of directors of Comsat that Lockheed Martin may elect does not confer control.[155]

As the Commission has made clear in its *de facto* transfer of control precedents, however, the question is not whether any one of these ingredients, standing alone, constitutes *de facto* control, but whether, taken together, the cumulative effect of these and other elements would result in Lockheed Martin's having the "power to dominate the management" of Comsat.[156]

Considering the totality of the factors, there can be little doubt but that Lockheed Martin would "dominate" Comsat's corporate affairs if the transaction is allowed to

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[152] Id. at 340.

[153] See Petition at 10-11.

[154] Id. at 73; see also Comsat Opposition at 12 ("Lockheed Martin's acquisition of a 49 percent interest in Comsat will not, by itself, constitute a transfer of control").

[155] Lockheed Martin Opposition at 74.

[156] Applications of BBC License Subsidiary L.P., 10 FCC Rcd 7926, 7931-33 (1995) (quoting Benjamin L. Dubb, 15 FCC 274, 289 (1951)). In its Opposition, Lockheed Martin relies upon the Intermountain Microwave line of cases which, unlike this matter, deal with whether a third party has *de facto* control of FCC licensed facilities, not whether a transaction would give an equity holder *de facto* control of the licensee of such facilities. As a result, it is not surprising that the Intermountain cases do not identify the payment of a control premium as a factor to be considered, see Lockheed Martin Opposition at 85.

proceed.[157] Lockheed Martin has proposed taking a 49 percent voting stock interest in Comsat, which will dwarf the holdings of any other shareholder; [158] it will name at least three Comsat directors; it has substantial ties to three other directors; there is nothing that would prevent other Lockheed Martin directors (and others affiliated with Lockheed Martin who are not officers or employees of Lockheed Martin) from serving as Comsat directors; Lockheed Martin's representatives will serve on all of the major committees of the Comsat Board, including the nominating and compensation committees; and, through various minority control and contractual agreements with Comsat's top management, Lockheed Martin will retain significant control over a wide range of management decisions.

For all of this Lockheed Martin would pay a control premium of, by its own estimate, 38 percent,[159] which is well within the range typically paid for "control."[160] Against this background, the Opponents' insistence that Lockheed Martin will not "dominate" Comsat if the transaction is consummated blinks reality. As Professor Coffee concludes in his attached declaration responding to Lockheed Martin, Comsat, and their experts:

> Lockheed and COMSAT seek to rely on prior FCC precedents that sometimes allow potential acquiring firms to purchase a substantial minority stake, that sometimes permit such firms to have designees on the board, that sometimes permit elaborate negative covenants to bind the target firm, and that sometimes accept change-of-control compensation. What they ignore is that no case has ever pushed the de facto control concept to this extreme. What is most distinctive about this case is the aggressive, even extreme manner in which all these elements have been combined. Conceptually, the

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[157] Lockheed Martin assures the Commission that it has pledged not to exercise control of Comsat and argues that it is "contractually bound not to take control of Comsat without prior Commission approval." Lockheed Martin Opposition at 70. These commitments are chimerical: Lockheed Martin's pledge means nothing more than Lockheed Martin wants it to mean because it turns on Lockheed Martin's definition of "control" and, if it does assume "control" of Comsat in violation of its contractual obligation, the only party that could enforce the agreement would be Comsat, which Lockheed Martin already would control.

[158] Lockheed Martin cites to WTIF, 1 F.C.C.2d 1543 (1965) for the proposition that a 49% equity interest does not confer *de facto* control. See Lockheed Martin Opposition at 73 n.194. In WTIF, however, the 49% owner was not even the largest owner; a single shareholder held the other 51% of the equity in the station.

[159] Lockheed Martin Opposition at 80.

[160] See Declaration of John C. Coffee, Jr., attached hereto as Exhibit 2 ("Coffee Reply") ¶ 6 & n.11 ("A study by two SEC officials of takeover premiums during the 1980s ... found that the average takeover premium during this period was 39.8%.").

> legal rubber band has been stretched beyond its breaking point. If de facto control is not found to have passed in this case, the concept of de facto control no longer is meaningful.[161]

B. LOCKHEED MARTIN AND COMSAT ARE EITHER DISINGENUOUS IN THEIR ANALYSIS OF THE *DE FACTO* CONTROL ISSUE OR THEY COMPLETELY MISUNDERSTAND THE ISSUE.

At the most fundamental level, and giving them the benefit of the doubt that they are not being disingenuous, Comsat and Lockheed Martin do not understand the *de facto* control issue.

1. Lockheed Martin's 49 Percent Ownership Stake Could Not Be Overcome By Other Comsat Shareholders.

Lockheed Martin argues that "a 49 percent equity interest will not confer *de facto* control…."[162] This conclusion is based on the fact that the Commission has "rejected the use of a simplistic, arithmetic calculation concerning the level of equity ownership that would constitute *de facto* control."[163] Certainly, however, as the Commission has recognized, if not "dispositive," an equity stake that so nearly approaches *de jure* control is a strong indicator of control.[164]

Indeed, when no other shareholder has an interest even approaching that size, it is unrealistic to believe that Lockheed Martin will not dominate the corporate affairs of Comsat with respect to any matter within the compass of shareholder authority. As Professor Coffee explains, "the acquisition of 49% plainly means that Lockheed will win any stockholder vote, because in any election involving a public corporation some percentage of shareholders simply do not vote."[165]

Comsat also misconstrues PanAmSat's position with regard to the impact that Section 304(b)(3) of the Satellite Act would have on Lockheed Martin's proposed 49 percent interest. Comsat argues that "the fact that the Satellite Act prohibits persons

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[161] Coffee Reply ¶ 22.

[162] Lockheed Martin Opposition at 72.

[163] Id. (parenthetical omitted).

[164] See George E. Cameron, Jr., 91 F.C.C.2d 870 (Rev. Bd. 1982), recon. denied, 93 F.C.C.2d 789 (1983), application for review dismissed as moot, FCC 84-367 (1984).

[165] Coffee Reply ¶ 9. For this reason, EU merger guidelines recognize that the acquisition of 49% of the voting stock of a publicly-held company normally would result in a change of control. See IV/M.025 - Arjomari-Prioux SA/Wiggins Teape Appleton plc; IV/M.343 - Societe Generale de Belgique/Generale de Banque; IV/M.613 - Jefferson Smurfit Group PLC/Munksjo AB; IV/M.731 - Kvaerner/Trafalgar.

other than authorized carriers from holding more than 10 percent of Comsat's stock does not advance PanAmSat's position that Lockheed Martin's proposed 49 percent interest in Comsat alone constitutes a transfer of control."[166] That was not, however, PanAmSat's point.

The 10 percent cap at least ensures that no other single shareholder will be able to acquire anything approaching Lockheed Martin's proposed 49 percent equity interest in Comsat. Moreover, using the interpretation that has been advanced by Comsat when its management was trying to protect itself from dissident shareholders, Section 304(b) would even prevent a group of unaffiliated non-carrier shareholders who together hold more than 10 percent of Comsat's stock from acting in concert in opposition to Lockheed Martin.[167] There is no risk, therefore, that Lockheed Martin's dominant shareholder position could be challenged by other Comsat stockholders.

2. Lockheed Martin Would Control A Powerful Voting Block On Comsat's Board Of Directors.

Lockheed Martin and Comsat also understate the level of influence that Lockheed Martin would have on the Comsat board of directors. First, each contests the notion that either a former Lockheed Martin director or a current Lockheed Martin lobbyist should be considered in determining the weight that would be given to Lockheed Martin's interests in Comsat's board decisions. They argue that there is no "factual or legal foundation" for the suggestion that a former Lockheed Martin director "will pay special fealty to Lockheed Martin's interests,"[168] and assert that the loyalties of Lockheed Martin's lobbyist cannot be divided because he is a presidential appointee.[169] Further, the Opponents maintain that these directors' fiduciary duties to Comsat "can more than adequately address any" conflict of interest that may arise.[170]

All of these claims are premised on a cramped view of conflict of interest concerns. For example, the law recognizes in many areas that loyalties do not cease to flow immediately upon termination of an association or relationship: Lawyers are

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166 See Comsat Opposition at 15 n.34.

167 See Appendix to Memorandum of Law submitted in Comsat Corporation v. Crockett, Civil Docket No. 97-607-A (E.D. Va. 1997) at 14, attached as Appendix 2 to the Petition.

168 Comsat Opposition at 18-19.

169 Id.; Lockheed Martin Opposition at 91. The Commission can easily disregard Lockheed Martin's carefully-worded sentence suggesting that these lobbying activities involved only "a law firm in which Peter Knight is a consultant." Id. Mr. Knight personally has registered as a Lockheed Martin lobbyist. See PanAmSat Petition at 18 n.62.

170 E.g., Lockheed Martin Opposition at 97 n.253.

limited by conflicts that current clients may have with former clients;[171] legal restrictions are placed on the private sector activities of former government employees;[172] and judges may be obliged to recuse themselves from cases involving former affiliations.[173] The presumption is not that the principals limited by these restrictions are dishonest or lacking in character; the applicable conflicts of interest rules merely recognize that loyalties — particularly loyalties of a fiduciary such as a director — can continue even when a formal association has terminated.

Similarly, the mere fact that a director is appointed by the President does nothing to dispel any other loyalties that he or she may have. As Professor Coffee states, "put simply, it would make a mockery of the concept of directorial independence to consider a registered lobbyist independent from his client."[174] When a decision has to be made for Comsat that will affect Lockheed Martin or its investment in Comsat, the Presidentially-appointed director who also is a Lockheed Martin lobbyist will have an unavoidable conflict between his fiduciary duty to Comsat and his personal and professional loyalties to Lockheed Martin. It was precisely to avoid such conflicts that Congress intended that the President "not select representatives of the carriers for his appointees."[175] The "black letter law of fiduciary duty" upon which the Opponents rely is precisely what creates the conflict of interest, it does not resolve it.

Finally, whether or not the former Lockheed Martin director and the Lockheed Martin lobbyist are "counted," the Opponents cannot escape the fact that the three directors who are to be directly selected by Lockheed Martin provide a floor, not a ceiling, for Lockheed Martin's representation on the Comsat board. Although Lockheed Martin "anticipates" that it will designate two current Comsat board members for two of the three board seats to which it would become entitled,[176] nothing in the transaction documents would prevent it from instead specifying other directors

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171 E.g., Rule 1.9 of the Washington D.C. Rules of Professional Conduct.
172 E.g., 18 U.S.C. § 207 (revolving door statute).
173 See, e.g., ABA Model Code of Judicial Conduct, Canon 3(E)(1)(b).
174 Coffee Reply ¶ 15.
175 Hearings before the Senate Comm. on Commerce, 87 Cong., 2d Sess. 38 (1962) (Testimony of Senator Case).
176 Lockheed Martin Opposition at 89.

of Lockheed Martin, or other persons who are associated with Lockheed Martin, so long as they are not officers or employees of the company.[177]

Moreover, whether Lockheed Martin will control three, four, five, or more directors, the question is not whether Lockheed Martin will be able to exercise unilateral control over Comsat or whether it will be able to "elect a majority of the Comsat Board,"[178] which would constitute *de jure* control. If that were the case, there would be no *de facto* control doctrine because some form of majority control always would be required. The question is, instead, whether Lockheed Martin would "dominate" the corporate affairs of Comsat.

As Professor Coffee notes, at least "six of Comsat's directors (Bennett, Hurtt, Knight, Alewine, Colodny, and the new to-be-appointed director) have close relationships with Lockheed that clearly compromise their independence; and in the case of the first five, they also have strong economic incentives to favor Lockheed's interests."[179] Control over a significant block of directors, along with a 49 percent equity ownership of Comsat, when no other single entity could have nearly equivalent counter strength either as a shareholder or in terms of board representation, strongly suggests, if it does not completely demonstrate in combination with all of the other factors, that Lockheed Martin would be in a dominant position.[180]

3. "Golden Handshake" Agreements Significantly Influence The Behavior Of Management.

The Opponents claim that the various "golden handshake" provisions added to the employment agreements of Comsat's top management are "normal" in "friendly

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[177] When PanAmSat observed that a Lockheed Martin director currently is chairman of Comsat's Compensation Committee, Comsat responded that this director has decided to resign his chairmanship. Comsat Opposition at 20. Putting aside the fact that the director has made no binding commitment, however, the fact remains that there is nothing to prevent Comsat from designating a successor who also is affiliated with Lockheed Martin.

[178] Comsat Opposition at 13; see also Lockheed Martin Opposition at 75-76 (arguing that Lockheed Martin will have to get others to consent in order to control certain actions of Comsat).

[179] Coffee Reply ¶ 19.

[180] In contrast, in Sprint Corporation, 11 FCC Rcd 1850 (1996) and MCI, 9 FCC Rcd 3960 (1994), both of which are cited by the Opponents, the minority investors held only a 20% interest in the target companies and there was no proscription similar to that found in Section 304(b) of the Satellite Act against any competing shareholder taking a larger stake. In addition, in MCI, the minority owner in question was not entitled to representation on the Nominating Committee of the MCI board. MCI, 9 FCC Rcd at 3961 n.12.

transactions."[181] This response again misconstrues the nature of PanAmSat's point. These provisions are not troubling because they are uncommon; they are troubling because they are so effective in securing the loyalty of management to an acquiring company.[182] Indeed, they are quite common in friendly takeovers for precisely that reason.

In this case, these provisions would ensure that the bulk of the Comsat top management team will seek to facilitate the takeover of Comsat by Lockheed Martin. Working in conjunction with a core group of the Comsat directors with similar interests, it is hard to imagine that any shareholder with contrary interests could stop them from achieving that goal.

It is not surprising, therefore, that Lockheed Martin has proposed paying a "control premium" for Comsat's stock. The actual extent of that premium is disputed, but even the Opponents concede that it is on the order of 38 percent over some reasonable approximation of market price.[183] Nonetheless, the Opponents object to calling this premium a "control premium" because they insist that Lockheed Martin is not acquiring control of Comsat at this stage of the transaction, but only an option to acquire control.[184] In fact, as Professor Coffee explains in his attached reply declaration, a premium of 38 percent is well within the range of premiums paid for control in a corporate takeover context.[185]

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[181] Lockheed Martin Opposition at 95.

[182] Coffee Reply ¶ 15 ("by definition economic incentives that make the director or officer more inclined to favor the bidder's proposal make the director or officer less independent.... I have never argued that 'golden parachutes' or severance compensation are unjustified, but only that they make the subject of such largess an interested [party].").

[183] See Lockheed Martin Opposition at 80.

[184] See id. at 81-83; Comsat Opposition at 16.

[185] Coffee Reply ¶ 6. The opponents refer to a couple of two-step communications transactions in which the acquiring company paid a sizable premium at the first stage in exchange for a less than 50% equity interest. See Lockheed Martin Opposition at 83-85 and Exhibit 5. In their view, these transactions demonstrate that a premium on the order of what Lockheed Martin proposes to pay for its initial interest is not necessarily indicative of control. The Opponents, however, are overlooking a critical fact. In neither of the other transactions was the FCC called upon to determine whether the equity and other rights vesting in the acquiring company at the first stage represented a *de facto* transfer of control. There is no foundation, therefore, for the conclusion that the Opponents attempt to derive from these transactions.

IV. THE PROPOSED TRANSACTION WOULD HAVE SIGNIFICANT ANTICOMPETITIVE IMPLICATIONS.

PanAmSat demonstrated that a combination between Comsat and Lockheed Martin should be scrutinized for its competitive impact. In support of that argument, PanAmSat submitted an analysis by Economists Incorporated ("EI"), showing that consummation of the proposed transaction would give "Comsat, Intelsat, Lockheed Martin and Intersputnik...an economic community of interest" that would "raise[] serious antitrust issues."

In response, rather than make an affirmative competitive showing dealing with the concerns raised by EI, the Lockheed Martin and Comsat continue to insist that "the Commission need not engage in a full competitive analysis of Lockheed Martin's limited and non-controlling investment,"[186] and, to the extent that they do respond to EI, they either quibble with EI's transponder counts or attack straw-man arguments fabricated from mischaracterizations of the points made by EI.[187]

As the attached response prepared by EI makes clear, the Opponents' attack on the EI competitive analysis does nothing to dispel EI's bottom-line conclusion; to wit, the proposed Comsat/Lockheed Martin combination raises a number of serious competitive concerns that merit close scrutiny.

First, the suggestion that the first stage of the Lockheed Martin takeover of Comsat should not be subject to a competition analysis may quickly be dismissed. As EI notes in its reply, it is a "well-established antitrust principle that transactions establishing inter-firm relationships short of merger may distort competitive incentives and thus require scrutiny."[188] In this case, the proposed Comsat/Lockheed Martin transaction would create partial ownership and joint venture relationships that would

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[186] E.g., Comsat Opposition at 28.

[187] The Opponents also argue that the concerns raised by EI are "irrelevant," Comsat Opposition at 29-31, apparently on the theory that the FCC should not be concerned about market concentration in non-U.S. satellite markets. To the contrary, the Commission not only has legal jurisdiction to consider the anticompetitive impact of the proposed transaction in non-U.S. markets, but that it should do so as a matter of policy. See 47 U.S.C. § 701(c) ("in connection with "United States participation in the global [INTELSAT] system,"" the activities of the corporation created under this [Satellite] Act and of the persons or companies participating in the ownership of the corporation shall be consistent with the Federal antitrust laws); id. § 154(i); Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, 11 FCC Rcd 18178, 18179-80 (1996) (enhancing competition in foreign satellite markets will benefit U.S. consumers).

[188] EI Reply, attached hereto as Exhibit 3, at 2.

implicate a number of vertical and horizontal consolidation issues.[189] The Commission cannot make a full public interest evaluation of the proposed transaction without addressing its potential for diminishing competition.

Second, the Opponents' reliance on the absence of market share data is fundamentally at odds with their obligation, as the applicants in this proceeding, to demonstrate that the proposed transaction will serve the public interest. EI's submission "suggests a need for further investigation."[190] The data that is missing, which is necessary for that investigation, is entirely within the control of the Opponents. The Opponents thus far have elected not to make a full competitive showing, or to provide the missing data to the public or the Commission.[191] They should not now be heard to fault EI for not basing its analysis on data that they have chosen not to supply.

The criticisms leveled by the Opponents at EI are based on mischaracterizations of the EI data.[192] Even as to the available data, EI concludes:

> A revisiting of the market share and concentration analysis of EI's original submission reveals the trivial effect that the criticisms of The Brattle Group and others, even if valid, would have on our analysis. For example, a review of the Euro-Asian geographic area reveals that there is a significant concentration of transponder capacity (an HHI of 1745) that the new association will increase by a minimum of almost 1500 points. Although our data do not include the future satellite plans of all companies, our preliminary analysis shows that the inclusion of these satellites would increase rather than decrease the post-merger concentration in the Euro-Asian region.

Although EI is not able to reach any final conclusion, its review of the Applications shows:

> that the Lockheed-Martin—Comsat acquisition merits continued scrutiny. This acquisition would form significant links between some of the most important providers of international satellite

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189 Id. at 4-6.

190 Id. at 10.

191 In its response, the Brattle Group provides some additional market share information, but those market shares "combine different geographic markets[, which] are not based on geographic markets relevant to this transaction.... In fact, these shares do not even always reflect the geographic market definitions that the Commission adopted in assessing Comsat's market dominance." Id. at 12.

192 See id. at 15-24.

> services. As a result, it is likely to increase significantly concentration of economic power among service providers in several highly concentrated markets.[193]

Lockheed Martin and Comsat have provided nothing to dispel this concern.

V. COMSAT HAS FAILED TO ENSURE THAT THE 50 PERCENT CAP ON AUTHORIZED CARRIER OWNERSHIP WOULD NOT BE EXCEEDED.

Since authorized carriers, as a group, may hold no more than 50 percent of Comsat's stock, if all other authorized carriers combined were to hold more than one percent, Lockheed Martin's owning 49 percent would result in a violation of federal law.[194] In its Petition, PanAmSat pointed out that Comsat apparently had made no effort to determine if carriers already own more than one percent of its stock. In their Oppositions, Comsat essentially concedes that it has not done so and Lockheed Martin attempts to justify this lapse. Comsat's failure, however, to ascertain whether, and to what extent, any of the beneficial owners of its stock are communications common carriers that should have applied to the Commission to become "authorized carriers" renders the Commission powerless to evaluate compliance with Section 304(b)(2).

Comsat and Lockheed Martin protest that Comsat has a class of stock that, pursuant to Comsat's Articles of Incorporation, is set aside for authorized carriers.[195] There is a world of difference, however, between establishing a separate class of stock for authorized carriers and ensuring that no carrier purchases the stock intended for the general public. A restriction is no restriction without enforcement and a share-count without some empirical foundation is merely a guess. If merely having a restriction on the books were sufficient to ensure compliance, the Commission could remove most qualification questions from its application forms; the Commission's enforcement personnel could close up shop; and policemen nationwide could cease their patrols. Sadly, the world is not as simple as that.

Comsat's view of Section 304(b) as self-enforcing is naive and simplistic. It is a safe bet that most persons arranging for trading in Comsat's stock have not the slightest idea what Section 304(b) requires, and may well be unaware without inquiring further whether the companies that they represent are engaged in any activities constituting

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[193] Id. at 24.

[194] 47 U.S.C. § 734(b)(2).

[195] Comsat Opposition at 9-10; Lockheed Martin Opposition at 138 ("Comsat knows the exact number of shares held by carriers because it maintains a separate series of shares for carriers.").

communications common carriage. Even in the case of Comsat shareholders who are not themselves carriers, the shareholders' underlying ownership may be such that authorized carriers would have an ownership interest in Comsat "directly or indirectly through subsidiaries or affiliated companies, nominees, or any persons subject to [their] direction or control."[196]

It is a virtual certainty, moreover, that some of Comsat's owners holding the class of stock reserved for non-carriers are in fact common carriers in an age of consolidation in which many large corporations have communications networks with excess capacity that they may sell to others; in which Disney owns a local exchange carrier; in which IBM until recently operated the Ardis network; and in which Warburg Pincus, commonly thought of as an investment company, is seeking to become the North American Numbering Plan Administrator.

Lockheed Martin objects that Comsat should not be required to "undertake unrealistic or onerous efforts" to determine whether or not other carriers cumulatively own more than one percent of Comsat's stock.[197] It further attempts to shift the burden to PanAmSat to show that the 50 percent cap has been exceeded.[198] However, the obligation to inform oneself about your compliance with a federal statute is neither unrealistic or onerous. PanAmSat merely has suggested that Comsat engage in the same type of statistical survey and analysis that other publicly-held companies do in order to demonstrate compliance with, for example, Section 310(b) of the Communications Act, regarding foreign ownership.[199]

As a holder of Title III common carrier authorizations, Comsat already should be polling its shareholders concerning compliance with Section 310(b). The minimal incremental effort required to ascertain compliance with Section 304(b) is something that Comsat can and should undertake. Unless and until it does, it is not possible to determine what portion of the 50 percent reserved for authorized carriers remains available, absent other impediments, for Lockheed Martin to acquire.

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196 47 U.S.C. § 734(b)(2).

197 Id. at 140.

198 See Lockheed Martin Opposition at 137-38 (claiming that PanAmSat's argument is based on "unsubstantiated assumptions regarding the current ownership of Comsat" and that it is "mere speculation").

199 See, e.g., In re HLT Corp. and Hilton Hotels Corp., 12 FCC Rcd 18144, 18152-18153 (1997); Applications of Nextwave Personal Communications, Inc., 12 FCC Rcd 2030, 2071-2076 (1997).

Finally, it is not PanAmSat's burden to prove non-compliance with the law. It is, as always, the applicant's burden in the first instance to demonstrate that grant of an application will not result in a violation of law.[200] In this case, the Applicants have failed to carry their burden and, as a result, the Commission cannot grant the applications.

VI. THERE IS AN INHERENT CONFLICT BETWEEN COMSAT'S SIGNATORY DUTIES AND LOCKHEED MARTIN'S ECONOMIC INTERESTS.

As set forth in PanAmSat's Petition, if the two Applicants are permitted to combine, the private interests of Comsat/Lockheed Martin would conflict with the public duties that Comsat has as the United States Signatory to Intelsat and Inmarsat. Traditionally, the Commission will not permit Comsat to "engage in activities that are inconsistent with its statutory mission or will interfere with or hinder realization of the [Satellite] Act's purposes and objectives."[201]

Lockheed Martin attempts to dismiss this objection as hinging entirely upon whether or not the proposed transaction will give Lockheed Martin control of Comsat.[202] It then states categorically that "[i]n the absence of any financial obligation [of Comsat] to Lockheed Martin, the conflict that PanAmSat perceives cannot exist."[203] In practice, however, the interests of Lockheed Martin and Comsat could not be so easily separated, as Lockheed Martin itself seems to argue when it is trumpeting the so-called public interest benefits of the transaction.

The point is that, whether or not the Commission finds that consummation of the proposed transaction would result in Lockheed Martin having *de facto* control of Comsat, there can be no question but that Lockheed Martin would be heavily invested in Comsat and that Comsat would be closely affiliated with Lockheed Martin. Whether or not Lockheed Martin will control Comsat after "Phase 1" of the transaction, there will be an identity of interests between the two that can be expected to affect Comsat's public interest mission. Indeed, the Commission has recognized in numerous contexts

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200 See, e.g., Applications of NYNEX Corporation and Bell Atlantic Corporation, 12 FCC Rcd 19985 (1997) (citing 47 U.S.C. § 309(e)); Application of Sam Jones, Jr., 10 FCC Rcd 5330 (1995).

201 In re Comsat Study — Implementation of Section 505 of the International Maritime Satellite telecommunications Act, 77 F.C.C.2d 564, 615 (1980).

202 See Lockheed Martin Opposition at 129.

203 Id. at 130.

that an affiliation based on far less than a 49 percent ownership interest is sufficient to distort incentives and change market behavior.[204]

The Comsat "division" of Lockheed Martin will be the very small tail of a very large defense company dog with interests in a variety of markets, including satellite design and manufacture.[205] Moreover, Lockheed Martin's joint ventures and alliances with other international and non-U.S. satellite ventures that give rise to the competitive concerns discussed above and in the EI report also create entanglements that give rise to conflict of interest concerns regarding Comsat's obligations as U.S. Signatory.[206]

That is not how Comsat should be "normalized" while it still is charged with important public responsibilities under the Satellite Act. The Congress created Comsat as a special purpose corporation and entrusted with a public interest mandate. Until that statute is modified and the Congress, not Lockheed Martin, normalizes Comsat, the Commission should do nothing that jeopardizes Comsat's public responsibilities.

If the proposed transaction is consummated, the FCC and the other executive branch agencies that deal with Comsat will be confronted with an entirely new and different Comsat, as well as a new set of conflicts and concerns. The mechanisms that are in place now, and upon which the Opponents rely,[207] were designed to regulate Comsat in its jurisdictional activities and some ancillary and incidental non-jurisdictional activities. To suppose that these mechanisms will be adequate to protect against inherent conflicts in the proposed Lockheed Martin/Comsat combination simply is unrealistic.

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[204] See, e.g., 47 C.F.R. § 76.501 (cable cross-ownership); 47 C.F.R. § 63.18(h)(1)(i) (foreign carrier affiliation).

[205] Lockheed Martin also has agreed to invest in the "Asia Cellular Satellite" joint venture. With the investment, Lockheed Martin will be the largest single shareholder in the ACeS regional geostationary satellite system. E.g., Mobile Satellite News, Lockheed Martin Partners With ACeS In Equity Venture (Jan. 7, 1999).

[206] For example, one of Lockheed Martin's partners in the ACeS regional satellite system, see n. 76 above, is the Philippine Long Distance Company, the dominant telecommunications company in Philippines, which has control over market access. The ACeS system, moreover, has just joined an alliance with the Euro-African Satellite Telecommunications (E.A.S.T.) and "joining ACeS and E.A.S.T. in the initiative are Lockheed Martin Corp. of the U.S. and Matra Marconi Space, a French-British aerospace venture. The companies said the initiative will link regional MSS systems together in a worldwide system." TR Daily (Jan. 14, 1999).

[207] See, e.g., Lockheed Martin Opposition at 132.

Indeed, as noted in the Petition, Section 6.2 of the parties' Agreement and Plan of Merger[208] prohibits Comsat from taking certain actions with respect to Intelsat, Inmarsat, and New Skies, in some cases even if the U.S. Government instructs it otherwise. The Opponents now claim that this provision does not mean what it appears to say and that, even if it does, Lockheed Martin would not require Comsat to violate any instruction of the U.S. Government. The plain meaning of the agreement that the parties themselves drafted dictates otherwise.

The first sentence of Section 6.2, it is true, absolves Comsat of liability for actions taken pursuant to U.S. government instruction. But what the first sentence gives to Comsat, the second sentence substantially takes back, providing that "[n]otwithstanding the foregoing [sentence]," and "other than as provided in Section 6.1A of the Comsat Disclosure Schedule or pursuant to [certain Intelsat, Inmarsat, and New Skies documents]," Comsat cannot take any of the actions specified in Sections 6.2(a), (b), and (c). This language gives the requirements of Sections 6.2(a), (b), and (c) precedence over U.S. government instructions. Unless instructed otherwise by the U.S. government, moreover — a right that the U.S. government exercises with respect to only a limited number of concerns — Section 6.2(d) prohibits Comsat from taking any action at Intelsat and Inmarsat meetings that "could reasonably be expected to material impair the economic value of" its Intelsat and Inmarsat investments, without regard to what the public interest requires.

In short, the Opponents have not rebutted the fact that these provisions create a disturbing conflict between Comsat's public responsibilities and its private obligations to Lockheed Martin, in all cases requiring Comsat to come down on the side of the latter.

VII. Lockheed Martin Has Not Yet Resolved The Conflict That Will Arise Between Its Duties As A Numbering Administrator And Its Role As A Common Carrier.

Lockheed Martin itself has conceded that the proposed transaction would tend to undermine its neutrality as the North American Numbering Plan Administrator ("NANPA").[209] For that reason, PanAmSat suggested that the Commission should not

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[208] SEC Disclosure at 73-74.

[209] Report to the North American Numbering Council and the Telecommunications Industry Concerning Lockheed Martin's Global Telecommunications Subsidiary, NANC Website (www.fcc.gov/ccb/Nanc/nanccorr.html) (Oct. 2, 1998) ("Lockheed Martin understands that the

allow the transaction to proceed unless and until the conflict between Lockheed Martin's role as a market participant and its role as a numbering administrator is completely resolved. In its opposition, Lockheed Martin now claims that there is no tension between those roles and that, in any event, it is "selling the division that holds the NANPA contract."[210]

Given the rigorous and careful "neutrality" review that the Commission has used in this context in the past, it is difficult to take seriously Lockheed Martin's assertion that it could be heavily invested in Comsat and still qualify as a neutral numbering administrator. Indeed, this portion of Lockheed Martin's response appears inconsistent with its own prior representations to the North American Numbering Council regarding its tender offer for Comsat's stock,[211] and conflicts with its decision to divest itself of the division that holds the NANPA contract.

All that remains of Lockheed Martin's opposition on this point, then, is its reliance on the fact that it is in the process of trying to sell the business unit (Lockheed Martin CIS) that serves as NANPA. Naturally, if Lockheed Martin someday were to sever completely its connections with the numbering administrator, the concerns with its conflict of interest would be rendered moot. That day has not come, however, and there are many questions that remain to be answered regarding Lockheed Martin's continuing role in numbering administration.[212]

For example, it is not at all clear that Lockheed Martin will in fact divorce itself from numbering administration. Although Lockheed Martin has agreed to transfer 95 percent of Lockheed Martin CIS to a third party, it also proposes to retain a five percent interest in the unit. Further, "the restructured CIS will deliver the same services using the same systems, processes and staff, and ... all of the staff, systems and infrastructure required to deliver CIS services will transfer from Lockheed Martin to the newly structured CIS."[213] It appears, therefore, that Lockheed Martin will remain closely

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planned acquisition of Comsat, in light of the previously announced strategic aims of the Global Telecommunications subsidiary, raises concerns about Lockheed Martin's neutrality.").

[210] Lockheed Martin Opposition at 140-41.

[211] See Letter from Yog R. Varma, Deputy Chief, FCC Common Carrier Bureau, to Jeffrey E. Ganek, Senior Vice President and Managing Director, Lockheed Martin IMS (Nov. 23, 1998) ("Lockheed Martin announced its intention to divest the Lockheed Martin [NANPA] ... unit, in order to adhere to the Commission's neutrality requirement for the NANPA").

[212] See FCC Seeks Comment On Request for Expeditious Review of the Transfer of the Lockheed Martin Communications Industry Services Business, CC Docket No. 92-237 (rel. Jan. 7, 1999).

[213] Id.

affiliated with the NANPA. This affiliation should itself raise questions about the "neutrality" of the restructured CIS.

Further, because the proposed transfer of Lockheed Martin CIS must be approved by the FCC, it is not a foregone conclusion that the transfer will take place, or that it will occur contemporaneously with any Commission action on the Applications. To the contrary, it appears certain that Mitretek, which serves as an alternate numbering administrator to Lockheed Martin,[214] will vigorously contest Lockheed Martin's proposal.[215] Therefore, it is at best premature for Lockheed Martin to claim that "there is no conflict between the proposed transactions and Lockheed Martin's Number Administration Contract."[216]

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[214] In the Matter of Administration of the North American Numbering Plan, 12 FCC Rcd 23040, 23075 (1997).

[215] See, e.g., Letter from Dr. H. Gilbert Miller, Vice President, Center for Telecommunications and Advanced Technology, Mitretek, to Lawrence E. Strickling, Chief, Common Carrier Bureau, FCC (Dec. 8, 1998).

[216] Lockheed Martin Opposition at 140.

CONCLUSION

For the reasons set forth above and in PanAmSat's Petition to Deny, the Applications should be denied.

Respectfully submitted,

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